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Notes

On the School Board's Hit List: Community Involvement in Protecting the First and Fourth Amendment Rights of Public School Students

by

PATRICK RICHARD MCKINNEY II*

"... So you understand that when we *increase* the number of variables, the axioms *themselves* never change. For example—"

Mrs. Underwood looked up alertly, pushing her harlequin glasses up on her nose. "Do you have an office pass, Mr. Decker?"

"Yes," I said, and took the pistol out of my belt. I wasn't even sure it was loaded until it went off. I shot her in the head. Mrs. Underwood never knew what hit her, I'm sure. She fell sideways onto her desk and then rolled onto the floor, and that expectant expression never left her face.¹

Introduction

The striking terror of a Stephen King novel is what many students currently fear or face in the nation's schools.² School

* J.D., Hastings College of the Law, 2001; B.A. University of California, Los Angeles, 1994. I would like to thank Professor D. Kelly Weisberg, Christina Lauridsen, David Kiernan, and Jessica Russell for their support and comments on prior drafts. Thanks are also due to Jesse Mainardi and Ryan Hassanein for their care in editing. Any errors that remain in the Note are solely attributable to the author.

1. STEPHEN KING, *Rage*, in THE BACHMAN BOOKS: FOUR EARLY NOVELS BY STEPHEN KING 1, 26 (1985).

2. As a result of Columbine and other school shootings, even Stephen King has been forced to reexamine his feelings about violent imagery. "I took a look at 'Rage' and said to myself, 'If this book is acting as any sort of accelerant, if it's having any effect on any of these kids at all, I don't want anything to do with it, regardless of what may be the moral

massacres like the one at Columbine High School in Littleton, Colorado, in the spring of 1999, and at Santana High School in Santee, California, this spring exemplify the dread of many children. In 1997 alone, students aged twelve through eighteen were victims of approximately 2.7 million crimes while at school.³ Seven to eight percent of junior high and high school students reported being threatened or injured with a weapon and nine percent reported carrying a weapon on school grounds.⁴ The presence of weapons and crime caused nine percent of students to admit feeling unsafe at school and while traveling to and from school in 1995.⁵ Teachers are not immune from being victimized. During the 1993-94 school year, students threatened 341,000 elementary and secondary school teachers with injury, and 119,000 teachers were physically attacked.⁶

Most schools respond to such aggressive and antisocial behavior with disciplinary action against the assailant. By choosing punishment as the remedy, many schools neglect to provide support and counseling to either the perpetrator or the victim.⁷ At least three quarters of all schools have zero-tolerance policies that mandate predetermined consequences or punishments for specific offenses.⁸ Other measures designed to promote safety include requiring

and legal rights and wrongs.' Even talking about it makes me nervous." *Dateline NBC: Misery—Stephen King and Wife Talk About His Accident* (NBC television broadcast, Nov. 1, 1999).

3. See PHILIP KAUFMAN ET AL., U.S. DEP'T OF EDUCATION, INDICATORS OF SCHOOL CRIME AND SAFETY: 1999 2 (1999). These crimes include 202,000 nonfatal serious crimes (classified as rape, sexual assault, robbery, and aggravated assault), 1.1 million nonfatal violent crimes (serious crimes plus simple assault), and 1.7 million thefts (61% of all crimes at school).

4. See *id.* at 7, 27.

5. See *id.* at 28. This same percentage of students, which translates into 2.1 million students, avoided one or more areas at school. See *id.* at 30.

6. See *id.* at 24. Between 1993 and 1997, teachers were the victims of nearly 1.8 million nonfatal crimes at school, including more than 1.1 million thefts and 657,000 violent crimes. See *id.* at 22. For a description of the various levels of crime, see *supra* note 3 and accompanying text. Another report estimates that 125,000 teachers are threatened with physical harm and 5200 are physically attacked in a typical month. See NATIONAL ASS'N OF SCHOOL PSYCHOLOGISTS, BEHAVIORAL INTERVENTIONS 14 (2000) [hereinafter BEHAVIORAL INTERVENTIONS].

7. See BEHAVIORAL INTERVENTIONS, *supra* note 6, at 17.

8. See KAUFMAN ET AL., *supra* note 3, at 117; see generally U.S. DEP'T OF EDUCATION, VIOLENCE AND DISCIPLINE PROBLEMS IN U.S. PUBLIC SCHOOLS: 1996-97 (1998) [hereinafter VIOLENCE AND DISCIPLINE]. These reports reveal that 94% of schools have zero-tolerance policies for firearms and 91% for weapons other than firearms. Further, 87% and 88% of schools do not tolerate alcohol and drugs, respectively. Finally, 79% of schools maintain a zero-tolerance policy for the catchall category of "violence."

students to wear uniforms, increasing the presence of security guards on campus, and implementing technological security devices, including metal detectors.⁹

Most tactics employed by schools to combat violence embody desirable societal goals of inculcating children by promoting safety, learning, and socially acceptable behavior. But what happens when no weapons are found and students are severely punished for mere words?

A recent example demonstrates the sweeping scope of zero-tolerance policies. Sarah Boman, a seventeen-year-old senior at Bluestem High School in Leon, Kansas, wrote a poem that contained the words "I'll kill you all" and tacked it on a classroom door. Finding that the piece constituted a "threat of violence" against the school, a three-member school district discipline committee suspended Boman for the remainder of the school year.¹⁰ The school

9. Student dress codes, which have been adopted by a small minority of schools, are beyond the scope of this Note. For an interesting discussion of this topic, see generally Christopher B. Gilbert, *We Are What We Wear: Revisiting Student Dress Codes*, 1999 BYU EDUC. & L.J. 3; Alison G. Myhra, *No Shoes, No Shirt, No Education: Dress Codes and Freedom of Expression Behind the Postmodern Schoolhouse Gates*, 9 SETON HALL CONST. L.J. 337 (1999); Pat Wingert, *Uniforms Rule*, NEWSWEEK, Oct. 4, 1999, at 72. For an informative look at the future of security in schools, see generally MARY W. GREEN, U.S. DEP'T OF JUSTICE, *THE APPROPRIATE AND EFFECTIVE USE OF SECURITY TECHNOLOGIES IN U.S. SCHOOLS: A GUIDE FOR SCHOOLS AND LAW ENFORCEMENT AGENCIES* (1999).

10. See Alex Branch, *Student Suspended for Art That Went Too Far*, HOUS. CHRON., Jan. 23, 2000, at A14. The following is the text of Boman's artwork:

Please tell me who killed my Dog.
 I miss him very much – He was my best friend.
 I do miss him terribly.
 Did you do it?
 Did you kill my dog?
 Do you know who did it?
 You know, don't you?
 I know you know who did it.
 You know who killed my dog.
I'll kill you if you don't tell me who killed my dog.
 Tell me who did it.
 Tell me. Tell me. Tell me.
 Please tell me now.
 How could anyone kill a dog?
 My dog was the best.
 Man's best friend.
 Who could shoot their best friend?
 Who?
 Dammit, Who?
 Who killed my dog?
 Who killed him?

agreed to reinstate her if a mental health specialist cleared her.¹¹ Instead, Boman and the American Civil Liberties Union (ACLU) defended the student's work as "conceptual art that depicted the deranged thoughts of a fictional madman" and brought suit to force her immediate return to school without the psychological examination. U.S. District Judge Wesley Brown reinstated Boman, finding no evidence that she was dangerous or that her art was intended as a threat.¹²

The misconstruction of Boman's poem by Bluestem High officials as threatening seems ridiculous. But school officials employ a broad definition of what constitutes a "threat," and Boman's story is one of many in a societal shift toward the abridgment of student rights.¹³ By 1970, Supreme Court precedents established that schoolchildren were entitled to many protections guaranteed by the Bill of Rights.¹⁴ The Court continues to bow to the constitutional rights of children, but uses the First and Fourth Amendments to undermine student rights.¹⁵ This divergence between what the Court says and what it does confuses lower courts and leaves them without a principled basis for analyzing student hit lists and other threatening speech.¹⁶ The Court consistently defers to the judgment of school administrators, ultimately jeopardizing both the inculcative function and student rights under the Constitution. Since courts are unwilling

Who killed my dog?
I'll kill you all!
You all killed my dog.
You all hated him.
Who?
Who are you that you could kill my best friend?
Who killed my dog?

Press Release, American Civil Liberties Union, ACLU Vows Legal Action Over Honor Student's Expulsion for Displaying Artwork (Jan. 20, 2000) (emphasis added).

11. *Mid-America Digest*, KAN. CITY STAR, Jan. 26, 2000, at B3.

12. *Mid-America Digest*, KAN. CITY STAR, Jan. 29, 2000, at B4.

13. A recent example demonstrates that Boman's case is not an isolated incident. On March 6, 2001, a 15-year-old student in Belmont, California, was arrested after penning a poem in which he mentioned "blowing up the school and causing people harm." Police arrested the student and the San Mateo County Sheriff's Office Bomb Squad searched his backpack for bombs, firearms, and other evidence. See Matthew B. Stannard, *Belmont Teen Held for Alleged Threats*, S.F. CHRON., Mar. 7, 2001, at A11.

14. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (freedom of speech); *In re Gault*, 387 U.S. 1, 27-28 (1967) (due process of law in juvenile court proceedings); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (equal protection of the law). See also NANCY E. WALKER ET AL., *CHILDREN'S RIGHTS IN THE UNITED STATES: IN SEARCH OF A NATIONAL POLICY* 177 (1999).

15. See *infra* Part I.

16. See *infra* Part III.

to protect student rights, concerned students and parents must strive to make changes on a broader, community level.

This Note examines the rights of students to freedom of speech, freedom from unreasonable searches and seizures, and due process at school in the wake of Columbine. Specifically, the analysis focuses on student writings and speech which are not endorsed or supported by the school and are best characterized as pure, private speech. Suspending or expelling students for violent imagery, or even threatening language, may violate the Constitution. However, federal courts, stressing the overriding concern with safety beyond the schoolhouse gate, hesitate to intervene. Therefore, as a matter of sound educational policy, parents, educators, and business leaders should devise community solutions that provide a safe and effective learning environment consistent with the fundamental rights of students.

Part I of this Note discusses the Supreme Court's recognition, and subsequent diminution, of students' rights to freedom of speech, due process, and freedom from unreasonable searches and seizures. This discussion reveals how the Court combines First and Fourth Amendment concepts to turn schools into constitutional "free zones," while maintaining that students have rights at school. Part II outlines the scope of the problem, examining the competing interests of students and schools officials, and suggests a hierarchy of protection for different forms of student speech which can be classified as "threatening." Part III conducts a case study and argues that the Court's reluctance to protect student rights has confused lower courts, rendering the courts an unreliable source of constitutional protection. In light of the perils of reliance on the judiciary, Part IV proposes a community solution that involves students, parents, teachers, school administrators, and community leaders. While current proposals offer visible and expedient "solutions" for student violence, a thorough reexamination of the underlying problems is necessary to make schools safe without violating the constitutional rights of students.

I. Constitutional Law in the Public Schools

"At the outset, it is important to note that a federal court's role in school disciplinary matters is very limited."¹⁷ The majority of

17. *Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 61*, 78 F. Supp. 2d 812, 821 (C.D. Ill. 2000).

incidents involving student discipline do not reach the courts, since most expulsion or suspension hearings are held before the school board or other school administrators.¹⁸ Even if a parent feels their child's constitutional rights have been violated, they may find it in the child's best interest to let the event pass without litigation.¹⁹ Recently, student discipline matters have reached the courts in a different way: delinquency adjudication hearings stemming from zero-tolerance policies. Zero-tolerance policies invite mechanical application and mandate that school officials work closely with law enforcement.²⁰ Students singled out for discipline under zero tolerance present serious questions about how far schools can go in demanding safety on school grounds. These questions remain unanswered.

The U.S. Supreme Court "has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to proscribe and control conduct in the schools."²¹ The Federal

18. See NATHAN L. ESSEX, *SCHOOL LAW AND THE PUBLIC SCHOOLS: A PRACTICAL GUIDE FOR EDUCATIONAL LEADERS* 60-66 (1999); THE PRINCIPAL'S LEGAL HANDBOOK 37-42 (William E. Camp et al. eds., 1993).

19. See Diane Marczely Gimpel, *Student Who Helped Write 'Hit List' Fights Expulsion: Quakertown District Expelled the Boy After Confiscating List of Targets*, MORNING CALL (Allentown), July 22, 1999, at B7. Jeremy Ostrander, a 13-year-old student, was expelled for helping to write a hit list with two other students. Jeremy's mother, Adele Lori Knouse, originally brought suit to overturn the expulsion, arguing that "threats are not threats unless they are communicated and there were no threats communicated here." Knouse had a change of heart after realizing the school district was obligated to educate Jeremy for the next year through alternative schooling, but would return him to the senior high school for the 2000-01 school year. In a strange twist, Sam Litzenberger, the attorney representing Ostrander, stated he would continue to represent Jeremy despite the mother's wishes. See Diane Marczely Gimpel, *Mother Will Fight Son's 'Hit List' Suit: A Lawyer is Appealing Richland Boy's Expulsion Despite Woman's Wishes*, MORNING CALL (Allentown), July 28, 1999, at B7; Robert L. Sharpe Jr., *Whose Lawyer is He, Anyway?*, LEGAL INTELLIGENCER, July 30, 1999, at 1.

20. See Dirk Johnson, *Schools' New Watchword: Zero Tolerance*, N.Y. TIMES, Dec. 1, 1999, at A1; Lisa Pemberton-Butler & Keith Ervin, *Schools' Traditions No Longer Light Issue—Class Pranks, Teasing Now Taken Seriously*, SEATTLE TIMES, Oct. 3, 1999, at B1.

21. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969); *id.* at 526 (Harlan, J., dissenting) ("[S]chool officials should be accorded the widest authority in maintaining discipline and good order in their institutions."). See also *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (finding that "the education of the nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges"); *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 893 (1982) (Powell, J., dissenting) ("[T]he states and locally elected school boards should have the responsibility for determining the educational policy of the public schools."); *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 208 (1982); *Wood v. Strickland*, 420 U.S. 308, 326 (1975); *Epperson*

Constitution neither explicitly nor implicitly recognizes a fundamental right to education.²² However, almost every state constitution commands the state legislature to provide a free primary and secondary public education to the state's students.²³ Because education is not considered a fundamental right, a court will not strike down school disciplinary policies unless they are "wholly arbitrary," "without any reasonable justification," or are an abuse of power which "shocks the conscience."²⁴

A. First and Fourth Amendment Protections Generally

The First Amendment provides, "Congress shall make no law . . . abridging the freedom of speech . . ."²⁵ The Fourth Amendment declares, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . ."²⁶

In general, freedom of speech is a fundamental personal liberty that is beyond proscription by the state.²⁷ The underlying rationale for protection of speech is that society benefits from the free trade in ideas, and submitting speech to the competition of the market best tests what is true.²⁸ Despite the fundamental right to freedom of

v. Arkansas, 393 U.S. 97, 104 (1968).

22. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35-37 (1973).

23. See *Davis v. Monroe County Bd. Of Educ.*, 526 U.S. 629, 664 (1999) (Kennedy, J., dissenting). See, e.g., CAL. CONST. art. IX, § 5; COLO. CONST. art. IX, § 2; GA. CONST. art. VIII, § 1, ¶1; IND. CONST. art. VIII, § 1; MD. CONST. art. VIII, § 1; MO. CONST. art. IX, § 1(a); NEB. CONST. art. VII, § 1; N.J. CONST. art. VIII, § 4, ¶1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.D. CONST. art. VIII, §§ 1, 2; OKLA. CONST. art. XIII, § 1; S.C. CONST. art. XI, § 3; TEX. CONST. art. VII, § 1; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, §§ 1, 2; WYO. CONST. art. VII, §§ 1, 9. See generally WILLIAM D. VALENTE & CHRISTINA M. VALENTE, *LAW IN THE SCHOOLS* 4-6 (4th ed. 1998).

24. See, e.g., *Dunn v. Fairfield Cmty. High Sch. Dist. No. 225*, 158 F.3d 962, 965-66 (7th Cir. 1998); *Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 61*, 78 F. Supp. 2d 812, 822 (C.D. Ill. 2000).

25. U.S. CONST. amend. I.

26. U.S. CONST. amend. IV.

27. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 570-71 (1942). Equally important to a democratic society is the right protected by the Fourth Amendment, which "confer[s], as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Despite the importance of the rights at stake, the modern law of search and seizure has been reduced to "a labyrinth of rules built upon a series of contradictory and confusing rationalizations and distinctions." *State v. Hygh*, 711 P.2d 264, 271-72 (Utah 1985) (Zimmerman, J., concurring).

28. This "marketplace of ideas" theory of freedom of speech was forcefully expounded by Justice Holmes. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J.,

speech, the right is not absolute at all times and in every situation. States may regulate the content of speech if it contains obscenity or fighting words.²⁹ A state may also proscribe advocacy of the use of force or violation of law if it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."³⁰ Content-neutral regulations that limit the time, place or manner of free speech are also constitutionally permissible.³¹ Confronted with these regulations, courts balance the individual's interest in free speech against societal interests.³² Time, place, and manner analysis fails where the government restricts speech in specific environments based upon content.³³

dissenting). Other theorists postulate that freedom of speech is essential to democracy or to achieve a sense of personal fulfillment. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 88 (1948) (democracy theory); MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS* 105 (1983) (self-fulfillment); see generally MARTIN H. REDISH, *FREEDOM OF EXPRESSION* (1984). Others argue that suppressing speech is counterproductive or that the government lacks competency to determine true speech from false speech. See, e.g., FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 75-76 (1982) (counterproductive theory); *id.* at 86 ("Freedom of speech is based in large part on a distrust of the ability of government to make the necessary distinctions, a distrust of governmental determinations of truth . . ."). For a cogent discussion of the theories underlying free speech, see ROBERT WHEELER LANE, *BEYOND THE SCHOOLHOUSE GATE: FREE SPEECH AND THE INCULCATION OF VALUES* 49-52 (1995).

29. See *Chaplinsky*, 315 U.S. at 571-72 (establishing that whether speech is an essential part of any exposition of ideas distinguishes protected from unprotected speech). See also *R.A.V. v. St. Paul*, 505 U.S. 377, 399 (1992) (White, J., concurring); *Schenck v. United States*, 249 U.S. 47, 52 (1919). Obscenity has been limited to speech that is predominantly erotic or sexual. See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 767 (Brennan, J., dissenting); *Erznoznik v. Jacksonville*, 422 U.S. 205, 213 n.10 (1975); *Miller v. California*, 413 U.S. 15, 24 (1973); *Roth v. United States*, 354 U.S. 476, 487 (1957). "Fighting words" can be defined as words that are "inherently likely to provoke violent reaction." *Cohen v. California*, 403 U.S. 15, 20 (1971). See also *Texas v. Johnson*, 491 U.S. 397, 409 (1989); *Gooding v. Wilson*, 405 U.S. 518, 523 (1972); *Chaplinsky*, 315 U.S. at 572.

30. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

31. See, e.g., *Kovacs v. Cooper*, 336 U.S. 77, 78 (1949) (upholding an ordinance which prohibited the use of "a sound truck, loud speaker or sound amplifier, or radio or phonograph with a loud speaker or sound amplifier, or any other instrument known as a calliope or any instrument of any kind or character which emits therefrom loud and raucous noises").

32. See, e.g., *Adderley v. Florida*, 385 U.S. 39, 41-42 (1966); *Schneider v. State*, 308 U.S. 147, 160-61 (1939). Time, place, and manner analysis employs a three prong test: (1) the regulation must be content neutral; (2) the regulation must be narrowly tailored to serve a significant government interest; (3) the regulation must allow for alternative avenues of communication. See LANE, *supra* note 28, at 70.

33. See *Cox v. Louisiana*, 379 U.S. 559, 567 (1965); Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1232 (1984).

B. The First and Fourth Amendments in the Schools

The Court relies on the "special characteristics of the school environment"³⁴ and the bare fact that children have not reached the age of majority to abridge the constitutional rights of students. Presumably, the right to freedom of speech in schools would require balancing the student's liberty interest to speak freely against society's interest to maintain order in the classroom. However, regulation of student speech represents a hybrid of content-based restriction in a specific environment where time, place, and manner analysis breaks down, so the Court defers to state action with greater frequency.³⁵ More alarming is the Court's belief, under the Fourth Amendment, that students have no reasonable expectation of privacy at school.³⁶ This section examines the relationship between the Supreme Court's First and Fourth Amendment jurisprudence as it applies to schools.

The Court has recognized that students possess rights under the First Amendment and do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."³⁷ Although school officials have comprehensive authority to proscribe and control conduct in the schools, this power is not absolute.³⁸ School officials may not violate the Bill of Rights nor convert state-operated schools into "enclaves of totalitarianism."³⁹ Failure to comply with the Bill of Rights will "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."⁴⁰ Students are "persons" under the Constitution and "may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."⁴¹ To justify

34. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

35. See *supra* notes 31-33 and accompanying text.

36. See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995) (finding that unemancipated minors lack "even the right of liberty in its narrow sense, i.e., the right to come and go at will.").

37. *Tinker*, 393 U.S. at 506.

38. See *id.* at 507.

39. *Id.* at 511.

40. *Id.* at 507; *West Virginia v. Barnette*, 319 U.S. 624, 637 (1943). This is consistent with the view that education "is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

41. *Tinker*, 393 U.S. at 511. Cf. ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 121-22 (1970) (finding that U.S. public schools are a "secular, nationalizing, assimilationist agent . . . charged with the task of Americanization, of melding backgrounds and creating one nation"). See also GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 526 (3d ed. 1996).

prohibition of particular expressions of opinion, the state must show that the proscribed activity would "materially and substantially interfere" with the school's ability to maintain a safe and effective educational environment.⁴²

At the center of the controversy in *Tinker* were John Tinker and Christopher Eckhardt, high school students in Des Moines, Iowa, and John's sister, Mary Beth, a junior high school student. In protest of the Vietnam War, the three decided to wear black armbands during the holiday season.⁴³ Aware of this plan, school officials "met and adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused would be suspended until he returned without the armband."⁴⁴ The students wore the armbands to school and, pursuant to the rule, were sent home and suspended until they returned without the armbands.⁴⁵ The students, through their fathers, filed a section 1983 action in federal district court seeking to enjoin the school officials from disciplining them.⁴⁶ The district court dismissed the complaint "on the ground that it was reasonable in order to prevent disturbance of school discipline."⁴⁷ The Eighth Circuit Court of Appeals considered the case *en banc* and, because the court was equally divided, affirmed the district court.⁴⁸ The Court reversed the Eighth Circuit and struck down the regulation, holding that the armbands were closely akin to "pure speech," which is entitled to comprehensive protection under the First Amendment.⁴⁹ Thus, after *Tinker*, personal speech that is not related to school activities is protected unless it "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school."⁵⁰

42. *Tinker*, 393 U.S. at 509; *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966).

43. *Tinker*, 393 U.S. at 504.

44. *Id.*

45. *See id.*

46. *See id.*

47. *Id.* at 505. Interestingly, the district court considered and rejected a similar case, *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966). *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 258 F. Supp. 971, 973 (S.D. Iowa 1966), *aff'd*, 383 F.2d 988 (8th Cir. 1967), *vacated by* 393 U.S. 503 (1969). In *Burnside*, the Fifth Circuit enjoined school officials from enforcing a regulation forbidding students from wearing "freedom buttons." *Burnside*, 363 F.2d at 749.

48. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 383 F.2d 988 (8th Cir. 1967), *vacated by* 393 U.S. 503 (1969).

49. *See Tinker*, 393 U.S. at 505-06.

50. *Id.* at 509 (quoting *Burnside*, 363 F.2d at 749). *See VALENTE & VALENTE, supra* note 23, at 175.

Tinker demonstrated the Court's belief that the Constitution applies to schoolchildren, but support for that proposition eroded in less than twenty years. Beginning in 1985, the Court used a student's Fourth Amendment claim to begin its retreat from *Tinker* by refusing to extend the same protections under the Bill of Rights to public school students as are available to adults elsewhere.⁵¹ An assistant vice-principal accused T.L.O., a high school freshman, of smoking in the bathroom with a friend. After denying the charge, T.L.O. was taken to the vice-principal's office and ordered to submit to a search of her purse. The search revealed a pack of cigarettes and cigarette rolling papers. A closer examination of the purse uncovered various paraphernalia associated with dealing marijuana.⁵²

In upholding the search, Justice White, speaking for the Court, stated that the Fourth Amendment applies to searches conducted by school authorities, but dispensed with the warrant requirement and probable cause.⁵³ "[T]he legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search."⁵⁴ Under this new reasonable suspicion standard, a search must be justified at its inception and the measures adopted must be "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."⁵⁵ "[T]he interests protected by the Fourth Amendment" must be balanced against "the interest of the States in providing a safe environment conducive to education in the public schools."⁵⁶ However, the uniqueness of the school setting resulted in a reduction of the child's interest in privacy in favor of "the substantial interest" of school officials in maintaining discipline on school grounds.⁵⁷

51. See *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985); JOHN W. JOHNSON, *THE STRUGGLE FOR STUDENT RIGHTS: TINKER V. DES MOINES AND THE 1960S* 207 (1997).

52. See *T.L.O.*, 469 U.S. at 328.

53. See *id.* at 333.

54. *Id.* at 341. The Court found this search reasonable based on a student's report to the vice-principal that T.L.O. was smoking in the lavatory. Searching T.L.O.'s purse "was the sort of 'common-sense [conclusion] about human behavior' upon which 'practical people—including government officials—are entitled to rely.'" *Id.* at 345-46 (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

55. *T.L.O.*, 469 U.S. at 341-42.

56. *Id.* at 332 n.2.

57. *Id.* at 339. See also ROBERT H. MNOOKIN & D. KELLY WEISBERG, *CHILD, FAMILY AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW* 1163 (3d ed. 1995).

In 1986, the Court imported the reasoning of *T.L.O.*, a Fourth Amendment decision, into First Amendment jurisprudence.⁵⁸ The Court held that the First Amendment does not prevent a school district from suspending a high school student for delivering a sexually suggestive speech at a school assembly.⁵⁹ During the speech, "[s]ome students hooted and yelled; some by gestures graphically simulated the sexual activities pointedly alluded to in respondent's speech."⁶⁰ Fraser was suspended for three days for violating a school rule prohibiting obscene conduct that "materially and substantially interferes with the educational process."⁶¹ Both the district court and the Ninth Circuit held that Fraser's First Amendment rights were violated, finding his situation indistinguishable from the black armbands in *Tinker*.⁶²

In reversing, the Court found a "marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content" of Fraser's speech.⁶³ Rejecting the "substantially interferes" test of *Tinker* and the Bethel High School disciplinary rule, the Court adopted a balancing test.⁶⁴ "The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."⁶⁵ Under this reasoning, prohibition of vulgar language "is a highly appropriate function of public school education."⁶⁶ The duty of "school authorities acting *in loco parentis*, to protect children—especially in a

58. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682-83 (1986).

59. See *id.* at 682-86. Fraser gave the following speech in support of Jeff Kuhlman, a classmate and candidate for student government office:

I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm.

Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.

Jeff is a man who will go to the very end—even the climax, for each and every one of you.

So vote for Jeff for A. S. B. vice-president—he'll never come between you and the best our high school can be.

Id. at 687 (Brennan, J., concurring).

60. *Id.* at 678.

61. *Id.* (quoting Bethel High School disciplinary rule).

62. See *id.* at 679-80.

63. *Id.* at 680.

64. See *id.* at 681.

65. *Id.*

66. *Id.* at 683.

captive audience—from exposure to sexually explicit, indecent or lewd speech,”⁶⁷ justified limited protection.

After *Tinker* and *Fraser*, which considered whether student speech must be tolerated under the First Amendment, the Court decided whether “the First Amendment requires a school affirmatively to promote particular student speech.”⁶⁸ In *Kuhlmeier*, three former members of the Hazelwood East High School newspaper, *Spectrum*, sought an injunction against school officials for violating their First Amendment rights by deleting two pages of articles from the May 13, 1983, issue.⁶⁹ Because school officials retained control over *Spectrum* and did not create a public forum,⁷⁰ they “were entitled to regulate the contents of *Spectrum* in any reasonable manner.”⁷¹ This form of censorship does not offend the Constitution because the *Tinker* standard “need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression.”⁷² The Court was reluctant to intervene because “the education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.”⁷³

67. *Id.* at 684. In support of this proposition, the Court cites *Ginsberg v. New York*, 390 U.S. 629, 631 (1968) (allowing states to constitutionally prohibit the sale to minors of “material defined to be obscene on the basis of its appeal to them whether or not it would be obscene to adults”) and *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 871-72 (1982) (acknowledging school board’s authority to remove library books which are vulgar). Neither of these cases invoke the *in loco parentis* doctrine.

68. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270-71 (1988).

69. *See id.* at 262. One of the articles that Principal Reynolds objected to described three students’ experiences with pregnancy. *See id.* at 263. The other discussed the impact of divorce on students at the school. *See id.* Instead of deleting the articles, Reynolds decided to withhold publication of the two pages that contained these stories. *Id.* at 263-64. Those two pages also contained articles on teenage marriage, runaways, and juvenile delinquents, as well as a general article on teenage pregnancy. *See id.* at 264 & n.1.

70. “[S]chool facilities may be deemed to be public forums only if school authorities have ‘by policy or by practice’ opened those facilities ‘for indiscriminate use by the general public’ or by some segment of the public, such as student organizations.” *Kuhlmeier*, 484 U.S. at 267 (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 47 (1983)). *See also* *Widmar v. Vincent*, 454 U.S. 263, 267 (1981); *Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm’n*, 429 U.S. 167, 174 n.6 (1976).

71. *Kuhlmeier*, 484 U.S. at 270.

72. *Id.* at 272-73.

73. *Id.* at 273. *See also* *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 208 (1982); *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 893 (Powell, J., dissenting); *Wood v. Strickland*, 420 U.S. 308, 326 (1975); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 526 (1969) (Harlan, J., dissenting); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

In a final blow to constitutional rights of students at school, the Court held that a student athlete drug policy, which authorizes random urinalysis drug testing of student athletes, does not violate the Fourth and Fourteenth Amendments of the Constitution.⁷⁴ Constitutional protection was not justified because the policy affects only children who "have been committed to the temporary custody of the State as schoolmaster."⁷⁵ Justice Scalia, speaking for the Court, found that unemancipated minors lack fundamental rights, "including even the right of liberty in its narrow sense, i.e. the right to come and go at will."⁷⁶ In this formulation, First, Fourth, and Fourteenth Amendment rights must give way to the "schools' custodial and tutelary responsibility for children."⁷⁷

By combining the Court's First and Fourth Amendment decisions in schools, a pattern of increasingly reduced protection emerges. The First Amendment cases established a protective "substantially interferes" standard, but reduced it to a balancing test followed by a general standard of reasonableness. The Fourth Amendment parallel allowed the Court to start from a position of reduced protection and move to a standard that removes the requirement of individualized suspicion. At best, *Vernonia* stands for the proposition that the Court will not question the judgments of state officials in matters of school discipline, even in the face of clear constitutional violations. At worst, the Court invites school officials to engage in lawless activity. "If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."⁷⁸ The reasoning behind *T.L.O.* and *Vernonia* may justify strip searches of students in the minds of some school administrators, but it remains an open question how the courts will receive such claims.⁷⁹

74. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664-65 (1995). The expressed purpose of the policy was "to prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs." *Id.* at 650.

75. *Id.* at 654.

76. *Id.*

77. *Id.* at 656.

78. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting), cited in *New Jersey v. T.L.O.*, 469 U.S. 325, 373 (1985) (Stevens, J., concurring and dissenting). Justice Stevens advocates a combination of First and Fourth amendment law in analyzing school searches and seizures. School officials may search students "when they have reason to believe that the search will uncover evidence that the student is violating the law or engaging in conduct that is seriously disruptive of school order, or the educational process." *Id.* at 378 (Stevens, J., concurring and dissenting).

79. See, e.g., *Konop v. N.W. Sch. Dist.*, 26 F. Supp. 2d 1189, 1208 (D.S.D. 1998) (denying summary judgment to school officials after two female eighth graders were strip

Focusing on the "special characteristics of the school environment" allows the Court to nod to the availability of constitutional protections while stripping students of First and Fourth Amendment rights. The Court employs identical reasoning in denying constitutional protections to those in the military⁸⁰ and confined in prisons.⁸¹ While it remains unlikely that the Court will explicitly state that the school environment is similar to a prison or the military, precedents established in the last 15 years create the same effect. The Court's deference to school officials in establishing and maintaining order in public schools threatens to turn the classroom into a constitutional "free zone," making it necessary for students to seek protection elsewhere.

C. Due Process Claims

"No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."⁸²

While the Court has not been receptive to First or Fourth Amendment claims by students, it remains possible to claim protection from overreaching by school officials under the Due Process Clause of the Fourteenth Amendment. At the heart of the due process argument is the idea that a student should not be disciplined unless he receives fair notice of the scope of the prohibition and consequences of the violation.⁸³ This section examines what is required to mount a due process claim against a

searched by a female teacher at the behest of the principal and no contraband was recovered).

80. See *Parker v. Levy*, 417 U.S. 733, 758 (1974).

While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience . . . [may] render permissible within the military that which would be constitutionally impermissible outside it.

Id. See also *STONE ET AL.*, *supra* note 41, at 1434-36.

81. See *Jones v. N.C. Prisoners' Union*, 433 U.S. 119, 126 (1977) ("Because the realities of running a penal institution are complex and difficult, we have [long] recognized the wide-ranging deference to be accorded the decisions of prison administrators."). This deference means that Fourth Amendment places no limits on a prison guard's search of the prison cell of convicted offenders. See *Hudson v. Palmer*, 468 U.S. 517, 525-26 (1984). This lack of Fourth Amendment protection also means that no inmate, convicted or not, can refuse to submit to strip or body cavity searches after any contact with non-inmates. See *Bell v. Wolfish*, 441 U.S. 520, 558 (1979).

82. U.S. CONST. amend. XIV, § 1.

83. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 691 (Stevens, J., dissenting).

student's disciplinary action and the likelihood of succeeding on such a claim.

The United States Supreme Court recognizes a student's constitutional property interest in receiving a public education and a liberty interest in protecting their reputation.⁸⁴ "The Fourteenth Amendment . . . protects the citizen against the State itself and all of its creatures—Boards of Education not excepted."⁸⁵ This protected property interest is not created by the Constitution, but from an independent benefit-conferring source, such as state statutes or administrative rules.⁸⁶ So long as a deprivation of property or liberty is not *de minimis*, due process protections are triggered.⁸⁷

After finding that due process applies, the question remains of what process is due.⁸⁸ At a minimum, "students facing suspension and the consequent interference with a protected property interest must be given *some* kind of notice and afforded *some* kind of hearing."⁸⁹ For a suspension of 10 days or less, a student must receive oral or written notice of the charges against him.⁹⁰ If he denies the charges, school officials must explain the evidence and allow the student to present his side of the story.⁹¹ Notice and hearing may be

84. See *Goss v. Lopez*, 419 U.S. 565, 574-75 (1975).

85. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

86. See *Goss*, 419 U.S. at 572-73. See also *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). As previously noted, this condition will almost always be satisfied since the Constitution of almost every state entitles students to a free and compulsory public education. See *supra* note 23 and accompanying text.

87. See *Goss*, 419 U.S. at 576 (finding that a 10-day suspension from school may not be imposed in light of due process protections).

88. See *id.* at 577.

89. See *id.* at 579. See generally *Mullane v. Cent. Hanover Trust Co.*, 339 U.S. 306, 314 (1950) ("[A] . . . fundamental requirement of due process . . . is notice reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."); *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1863).

90. *Goss*, 419 U.S. at 581.

91. *Id.* The Court reserved the question of what due process requires for suspensions of longer than 10 days or expulsions, but intimated that more serious disciplinary proceedings may require more formal procedures. See *id.* at 584. For expulsions and longer suspensions, one scholar argues that administrators should err on the side of providing students full due process protections, including, but not limited to, the following: notice of charges; prior notice of hearing; right to legal counsel at all appropriate stages; hearing before an impartial jury; right to compel supportive witnesses to attend; right to confront and cross-examine adverse witnesses, and/or to view and inspect adverse evidence prior to hearing; right to testify in their own behalf; and right to have a transcript of proceedings for use on appeal. See ESSEX, *supra* note 18, at 63.

informal, but should normally precede removal of the student from school.⁹²

There is an important exception to due process requirements: "Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school," provided notice and hearing follow as soon as practicable.⁹³ The dilemma for school officials under this exception is determining (1) when does a student's mere presence pose a "continuing danger to persons or property" and (2) when does a student pose an "ongoing threat of disrupting the academic process"? For threatening behavior, *Brandenburg* provides an appropriate rule. Advocating force or illegality may be proscribed if it is "directed to inciting imminent lawless action and is likely to incite or produce such action."⁹⁴ The next two sections examine how schools and courts answer these questions following several sensational violations of the sanctity of the schoolhouse. The answers reveal that school policies are overinclusive and courts do not provide adequate safeguards by mandating different grades of protection for student speech that is threatening.

II. Threatening Words and the Competing Interests of Student and State

"She had a chemistry set and planned one day to blow up the world."⁹⁵

Thoughtful analysis of the mindset of school administrators and students in the 1999-2000 and 2000-2001 academic years must be processed through the Columbine High School massacre. On April 20, 1999, two gunmen, wearing ski masks and long black coats, entered Columbine High School and committed the deadliest school massacre in the nation's history. Eric Harris, eighteen, and Dylan Klebold, seventeen, both seniors at Columbine, armed themselves with several handguns and bombs and carried out a well-planned, methodical attack. The two laughed as they killed and, according to many witnesses, singled out black students and athletes in payback

92. *See Goss*, 419 U.S. at 582.

93. *Id.* at 582-83; VALENTE & VALENTE, *supra* note 23, at 169 & n.9. *See also* McClain v. Lafayette County Bd. of Educ., 673 F.2d 106, 110 (5th Cir. 1982) (involving deadly weapons); Hill v. Rankin County, Miss. Sch. Dist., 843 F. Supp. 1112, 1118-19 (S.D. Miss. 1993) (involving physical assault); Gardenshire v. Chalmers, 326 F. Supp. 1200, 1206 (D. Ky. 1971) (involving firearms).

94. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

95. LOUISE FITZHUGH, *HARRIET THE SPY* 29 (1964).

for taunts and prejudices. When authorities secured the building five hours later, the assailants had killed twelve students and a teacher before turning their weapons on themselves.⁹⁶

The Columbine tragedy, which unfolded on national television, was the most sensational of a wave of school shootings over a period of approximately two years.⁹⁷ On December 6, 1999, a thirteen-year-old middle school student shot and wounded four classmates before being stopped by a teacher in Fort Gibson, Oklahoma.⁹⁸ One month after Columbine, a fifteen-year-old student at Heritage High School in Conyers, Georgia, wounded six students in a commons area.⁹⁹ On May 21, 1998, Kip Kinkel, fifteen, killed his parents at home before proceeding to school and killing two teen-agers and wounding more than twenty in Springfield, Oregon.¹⁰⁰ In Jonesboro, Arkansas, an eleven-year-old and a thirteen-year-old injured ten people and killed four girls and a teacher during an ambush on March 24, 1998.¹⁰¹ A fourteen-year-old at Heath High School in West Paducah, Kentucky killed three and wounded five others on December 1, 1997.¹⁰² Finally, a sixteen-year-old in Pearl, Mississippi, killed his mother and shot nine at his high school, killing two on October 1, 1997.¹⁰³

96. See Lisa Belkin, *Parents Blaming Parents*, N.Y. TIMES, Oct. 31, 1999, (Magazine), at 61; James Brooke, *Terror in Littleton: The Overview—2 Students in Colorado School Said to Gun Down as Many as 23 and Kill Themselves in a Siege*, N.Y. TIMES, Apr. 21, 1999, at A1; Julie Cart et al., *Tragedy in Colorado: Armed Youths Kill up to 23 in 4-Hour Siege at High School*, L.A. TIMES, Apr. 21, 1999, at A1. The student victims in the Columbine shooting were Cassie Bernall, Steven Curnow, Corey DePooter, Kelly Fleming, Matthew Kechter, Daniel Mauser, Daniel Rohrbough Rachel Scott, Isaiah Shoels, John Tomlin, Lauren Townsend, and Kyle Velasquez. One teacher, William "Dave" Sanders, was also a victim in the massacre. See NATIONAL SCHOOL SAFETY CENTER, REPORT ON SCHOOL ASSOCIATED VIOLENT DEATHS 21-22 (1999).

97. Although Columbine remains the deadliest school shooting, the 2000-2001 academic year has not been without violence. On Mar. 5, 2001, Charles Andrew "Andy" Williams, a 15-year-old Freshman at Santana High School in Santee, California, killed two students and wounded thirteen other people before surrendering. See Stacy Finz et al., *Rampage at School—Two Students Slain: 15 year-old Boy Arrested After Shootings Near San Diego Wound 13*, S.F. CHRON., Mar. 6, 2001, at A1; Jeff McDonald, *Terror Hits Home*, S.D. UNION-TRIB., Mar. 6, 2001, at A1.

98. See Jim Yardley, *Boy Shoots 5 Schoolmates in Oklahoma*, N.Y. TIMES, Dec. 7, 1999, at A17.

99. See Edith Stanley & J.R. Moehringer, *6 Students Shot in Georgia: Boy, 15, Surrenders*, L.A. TIMES, May 21, 1999, at A1.

100. See Kim Murphy & Terry McDermott, *Shooter Kills 1, Injures 22 at Oregon School*, L.A. TIMES, May 22, 1998, at A1.

101. Stephen Braun & J.R. Moehringer, *5 Shot Dead at School in Arkansas: 2 Boys Held*, L.A. TIMES, Mar. 25, 1998, at A1.

102. Stephen Braun & Judy Pasternak, *Student Opens Fire on Prayer Group, Kills 3*, L.A. TIMES, Dec. 2, 1997, at A1.

103. Thomas B. Edsall, *Mississippi Boy Held in School Killing Spree: Teenager is Also*

"Columbine forever changed things for all of us."¹⁰⁴ The Columbine attack, like many other school shootings, surprised and confused students and teachers. "Everybody thought it was a joke, a senior prank."¹⁰⁵ Columbine, a high school with 1,870 students, is located in the affluent community of Littleton, Colorado, a Denver suburb with a population of 39,000. One parent expressed the prevailing view: "It's the last place you could imagine something like this happening."¹⁰⁶ School officials had no reports of trouble from the suspects. Even Klebold's parents claim to have never seen "anger or hatred in Dylan until the last moments of his life when we watched in helpless horror with the rest of the world."¹⁰⁷

Warning signs were present, even if school officials, parents, and residents of the community remained unaware. Media attention latched on to Harris and Klebold's (the Columbine gunmen) affiliation with the "Trench Coat Mafia," a small group who banded together and dressed in Gothic-style clothing highlighted by long, black trenchcoats. More important than their clique was the passion the two gunmen shared for guns and other weapons.¹⁰⁸ Students at Columbine were also aware that other students, such as the jocks, picked on the gunmen and their clique because of their appearance.¹⁰⁹ This manifestation of disaffection from the school and access to weapons should have cued parents or school officials that trouble was on the horizon. But it did not and school officials around the country

Accused in Mother's Stabbing Death, WASH. POST, Oct. 2, 1997, at A03.

104. Francis X. Clines, *Rating System to Help Schools Track Violent Students*, S.F. CHRON., Oct. 24, 1999, at A3.

105. James Barron & Mindy Sink, *Terror in Littleton: The Scene—In a Violent Instant, Routine Gives Way to Panic*, N.Y. TIMES, Apr. 21, 1999, at A1. A similar theme emerged following the Santana High School shooting since as many as twenty students knew of threats made by Williams but failed to act because they believed he was joking. See McDonald, *supra* note 97, at A1; Timothy Egan, *School Shooting Underlines Illusion of Safety*, N.Y. TIMES, Mar. 9, 2001, at A1; Chris Moran & Karen Kucher, *Teens Caught Between Loyalty and Disclosure*, S.D. UNION-TRIB., Mar. 6, 2001, at A7.

106. See Cart et al., *supra* note 96, at A1. In Santee, residents pointed "to the low crime rate, the ubiquity of schoolchildren, the dearth of visible poverty or gangs, as if all these were immunizing factors." Egan, *supra* note 105, at A1. Andy Williams, the shooter, came from the "darker side of Santee," however, "a Joan Didion world of dropouts and tough teenagers with time on their hands who smoke marijuana and delight in stealing vodka and tequila from the local Albertson's store." Todd S. Pardum, *Shattered Town Has No Answers: California Community Tries to Find Downfall of "Angry Young Man"*, MILWAUKEE J. SENTINEL, Mar. 7, 2001, at A01.

107. See Belkin, *supra* note 96, at 61.

108. See Brett Pulley, *Terror in Littleton: The Trench Coat Mafia—Students on the Fringe Found a Way to Stand Out*, N.Y. TIMES, Apr. 21, 1999, at A17.

109. See Cart et al., *supra* note 96, at A1.

have scrambled to make sure their campuses are not hiding deadly secrets.

"Look inside a high school, and you are looking in a mirror, under bright lights. How we treat our children, what they see and learn from us, tell us what is healthy and what is sick—and more about who we are than we may want to know."¹¹⁰ All of the assailants in the school massacres mentioned above fit a common profile: young males, raised in suburban or rural communities, misfits seeking to avenge their classmates' slights. This knowledge should guide proposals to maintain school safety, and this can be done without abridging the constitutional freedoms we should strive to instill in the general student population.

A. How Compelling is the State Interest?

In a broad sense, the State's interest is in "the proper functioning of its public school system for the benefit of *all* pupils and the public generally."¹¹¹ "Some modicum of discipline and order is essential if the educational function is to be performed."¹¹² School discipline is necessary to provide an understanding of the "social compact of respect for the rights of others."¹¹³ Under this view, the inculcative function of the school prepares students to become productive members of society. Incultation involves passing on to students a set of norms, social and moral aims, civic goals, economic values, and a sense of personal development.¹¹⁴

This function is difficult to perform when the nation's public educational institutions are overwhelmed and under siege. Projections for the year 2000 indicate that more than 47.5 million students will be enrolled in public schools at the kindergarten through twelfth grade levels.¹¹⁵ In 1997, 4,205 children were killed by gunfire—one every two hours, totaling nearly twelve each day.¹¹⁶ One reason for increased security in the fall of 1999 was a wave of

110. Nancy Gibbs, *A Week in the Life of a High School*, TIME, Oct. 25, 1999, at 68.

111. *Goss v. Lopez*, 419 U.S. 565, 591 (1975) (Powell, J., dissenting) (emphasis added).

112. *Id.* at 580.

113. *Id.* at 593 (Powell, J., dissenting).

114. See LANE, *supra* note 28, at 59-62.

115. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 1999 163 (1999) [hereinafter STATISTICAL ABSTRACT].

116. JILL M. WARD, CHILDREN'S DEFENSE FUND, CHILDREN AND GUNS: A CHILDREN'S DEFENSE FUND REPORT ON CHILDREN DYING FROM GUNFIRE IN AMERICA 2-3 (1999). The number of children killed each year by gunfire equals 90 school buses full of children, or more than an entire graduating class of a high school the size of Columbine every school month.

bomb threats and hit lists in the spring of 1999, following the Columbine rampage. As a result, administrators were much more willing to implement drastic measures to restore a sense of security to school buildings.¹¹⁷

Criticisms about the safety of the nation's schools fueled educators' desires to increase security. "We've got to let the kids know who's in charge of the schools And if that means we're infringing on somebody's individual freedom of expression, then so be it."¹¹⁸ Many school administrators around the country share the sentiment expressed by the chairman of the school board in Coweta County, near Atlanta, Georgia. This authoritarian attitude has led many schools to install metal detectors, remove lockers, and prohibit students from carrying any sort of backpack or gym bag to school.¹¹⁹ A Michigan school replaced tornado safety charts in classrooms with charts explaining the procedure for invasions by gunmen or intruders.¹²⁰

The linchpin of many school safety programs is the "zero-tolerance" discipline policy.¹²¹ Zero-tolerance policies owe their

117. See, e.g., Jon Frank, *Returning Students Include Threat-Makers: Some Say Schools Overreacted with Student Crackdown After Columbine*, VIRGINIAN-PILOT (Norfolk), Sept. 6, 1999, at A11 (charging 50 students with making threats in the wake of Columbine, although no violence occurred); Michelle McNeil Solida, *Security Tops Back-to-School Concerns: In Indiana—Area Schools Hope that a Summer Full of Preparation Enhances Safety for Students*, INDIANAPOLIS STAR, Aug. 15, 1999, at A01.

118. Kevin Sack, *Schools Look Hard at Lockers, Shirts, Bags, and Manners*, N.Y. TIMES, May 24, 1999, at A1.

119. See Sue Anne Pressley, *Year of Mass Shootings Leaves Scar on U.S.: Sense of Safety Suffers as Fewer Believe 'It Can't Happen Here.'* WASH. POST, Jan. 3, 2000, at A01; Diane R. Stepp, *School Cops in Tactical Classes: New Safety Emphasis: Mock Drills, Target Practice and Advanced Courses Are Part of an Upgrade in Training for Campus Security Officers*, ATLANTA J. & CONST., Aug. 12, 1999, at 1JG (authorizing 30 school security officers in Cobb County, Georgia, to carry 9 mm semiautomatic weapons on school grounds); Sack, *supra* note 118, at A1 (allowing students to carry only transparent or mesh bookbags and considering buying students two sets of books, one for home and one for school).

120. See George Hunter & Janey Naylor, *School's In, So is Security: Cameras, More Cops Watch Over Students*, DETROIT NEWS, Aug. 23, 1999, at A1. One student's reaction to the change: "It's nuts." *Id.*

121. See Julie N. Lynem, *Schools Around U.S. Not Sparing the Rod: Zero-Tolerance Policy on Campus Violence*, S.F. CHRON., Jan. 4, 2000, at A1; Johnson, *supra* note 20, at A1; Peggy Lowe, *Zero-Tolerance Policy a Hard Lesson for Teens*, DENVER POST, Oct. 22, 1999, at A01; Karen Robinson, *New Student Code Takes Effect in September*, BUFFALO NEWS, June 4, 1999, at 4B. Aside from sweeping student speech into its purview, zero-tolerance policies also lead to the expulsion or suspension of students for many other types of innocuous behavior. For example, a 6-year-old boy in Colorado Springs, Colorado, was suspended from first grade for sharing his lemon cough drops with friends. In compliance with the school's zero-tolerance policy on drugs, the boy's teacher summoned the fire

genesis to a 1980s San Diego program that allowed authorities to seize sea vessels for even trace amounts of drugs.¹²² Recent federal manifestations include the Gun Free Schools Act of 1994,¹²³ which mandates a one year expulsion for any child who brings a firearm to school,¹²⁴ and the Safe Schools Act of 1994.¹²⁵ For certain school offenses, zero-tolerance policies mandate predetermined consequences, such as suspension or expulsion.¹²⁶ While many of these policies are rightly aimed at instrumentalities of harm, such as drugs, guns, and other weapons, of far greater concern are the policies adopted in nearly 80% of schools which have no tolerance for the general category of "violence."¹²⁷

Not everyone feels that the tougher stance schools are taking is effective. Cathy Danyluk, a school safety specialist with the Indiana Department of Education, fears many of the precautions are just "knee-jerk reactions" undertaken to allay the fears of nervous communities.¹²⁸ Some students have expressed the view that school administrators should have more faith in the teenage population and not simply react with punishment.¹²⁹

These criticisms are well taken since, despite the prevalence of guns in the hands of children, massacres such as Columbine distort the true nature of violence in schools. Schools remain one of the safest places for children, as less than one percent of violent deaths of children occur at school.¹³⁰ Violent crimes by juveniles peak once the school day ends, in the afternoon between three and four p.m.¹³¹

department and an ambulance. A 5-year-old boy in Pennsylvania violated the school's weapons policy and was suspended from kindergarten because his Halloween firefighter costume include a small plastic ax. In Bremerton, Washington, more than a dozen junior high students were suspended for taking Alka Seltzer on campus. A 15-year-old honors student in Michigan was suspended for more than a month for bringing a butter knife to school to slice baked goods her friend had baked. See Richard Roeper, 'Zero Tolerance' Often Applied with Zero Logic, CHI. SUN-TIMES, Nov. 17, 1999, at 11.

122. See Russell Skiba, *No to Zero Tolerance*, WASH. POST, Jan. 14, 2000, at A27.

123. Gun Free Schools Act, 20 U.S.C. §§ 8921-8926 (1994).

124. *Id.* at § 8921(b)(1).

125. 20 U.S.C. §§ 5961 *et seq.* (1998) (allowing for competitive grants to eligible local educational agencies to carry out Goal Six of the National Education Goals by helping to ensure that all schools are safe and free of violence). See *id.* at 5962(a)(1).

126. See KAUFMAN ET AL., *supra* note 3, at 117.

127. See generally VIOLENCE AND DISCIPLINE, *supra* note 8.

128. Solida, *supra* note 117, at A01.

129. See Kelly Pearce, *Security Threats Paralyze Schools*, ARIZ. REPUBLIC, Jan. 12, 2000, at A1.

130. U.S. DEP'T OF EDUCATION, EARLY WARNING, TIMELY RESPONSE: A GUIDE TO SAFE SCHOOLS 1 (1998)[hereinafter EARLY WARNING].

131. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF

Juveniles are also most likely to be the victims of violent crimes between two and six p.m.¹³² "Children are far more likely to be killed after school, in their own homes, or in their friends' homes than in school Despite the decline in the victimization rate in schools over the past several years, students report *feeling* less safe at school today than they did just a few years ago."¹³³

School shootings are anathema to educators, parents, and students. The reforms mentioned are expedient and visible "solutions" to perceived problems. However, there is no indication that increased security or zero-tolerance rules reduce violence or make students feel safer at school. Zero-tolerance for "violence" sweeps many activities into its purview which do not merit exclusion: the school yard fight, tough talk which is nothing more than talk, and even the student hit list. If one accepts that the purpose of education is to introduce children to the "social compact of respect for the rights of others,"¹³⁴ it is difficult to reconcile that purpose with the policy of suspending or expelling a student for the use of threatening language not accompanied by a more serious infraction. Courts should strike the vague language of "violence" on due process grounds when violations consist of mere speech. More importantly, educators should heed their constitutional duty to tailor rules which punish only activities that merit discipline.

B. The Student's Interest in Civil Liberty

States have a cognizable interest in prohibiting speech which threatens the safety of their institutions or the children under their care, but that interest cannot be without limits. As an aid to determining those types of speech that properly warrant punishment and those that more appropriately warrant other forms of attention, this section creates a hierarchy of threatening speech by students. Three types of student speech fall within the range of conduct that at least some school officials believe merit discipline under current proscriptions. First, some student expression, when taken out of context, contains violent or what might be considered threatening language. Other expression contains outwardly threatening language, but the student lacks intent or present ability to carry out the threat.

JUSTICE, 1999 NATIONAL REPORT SERIES: VIOLENCE AFTER SCHOOL 2 (1999).

132. *Id.* at 5.

133. WARD, *supra* note 116, at 8.

134. *Goss v. Lopez*, 419 U.S. 565, 593 (1975) (Powell, J., dissenting).

Finally, some threats by students are coupled with the intent and present ability to inflict violence on themselves or others.

To constitute a threat, a statement should contain at least two elements: (1) the intent or present ability to carry out the threat by the person making the threat; and (2) a belief by the person threatened that the person making the threat has the intent or present ability to carry out the threat. In determining whether language constitutes a threat, educators must treat their students with the same respect and dignity that they expect from students in dealing with one another. The Bill of Rights carries with it an implicit responsibility to teach children the value of tolerance. Punishing students who feel alienated does not pursue this responsibility and only serves to discourage diversity in favor of homogeneity.¹³⁵ This section describes each of the three types of expression and recommends the appropriate level of protection each should be accorded by school officials.

C. Violent Imagery as Protected Speech

Speech containing violent imagery or strong language without any other indication of a threat, such as Sarah Boman's poem,¹³⁶ should be afforded the utmost constitutional protection. If this type of expression is not school-sponsored and does not "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," it is protected by the First Amendment.¹³⁷ If a student is excluded or prosecuted under a zero-tolerance policy for "violence," the rule should not survive attack under the Due Process Clause, since the expression cannot be fairly described as a "threat."

Consider the following scenario: You teach seventh grade in Texas and, near Halloween, you assign your students to write a story about being home alone and hearing noises. The next day, Chris, a

135. See Diana Philip, *Student Rights: Civil Liberties Don't Have to be Sacrificed for School Safety*, DALLAS MORNING NEWS, Aug. 1, 1999, at 6J.

136. See *infra* note 10 and accompanying text. Recall that Boman's poem, which was written in the voice of a fictional madman, contained the phrase "I'll kill you all" and was tacked on a classroom door. Would the analysis change if Boman's posting occurred within a week of the Columbine High School tragedy? What if, instead of writing of a bomb, she scrawled the words "Bomb on Monday" on the locker room wall and told other students "not to tell anybody"? See *In re M.J.S.*, No. C3-00-76, 2000 Minn. App. LEXIS 784, at *8 (Minn. Ct. App. July 25, 2000) (affirming a male student's adjudication of delinquency for communicating terroristic threats under the foregoing facts).

137. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (citing *Burnside v. Byars*, 363 F.2d 744, 749 (1966)).

thirteen-year-old, volunteers to read his story for the class and delivers the following, "I thought it was a crook so I busted out with a 12 guage (sic) and Ismael busted out with 9mm and we step off the porch and this bloody body dropped (sic) down in front of us and scared us half to death."¹³⁸ Before concluding, he mentions a shotgun, a handgun, various drug paraphernalia, and accidentally shooting you and two students.

While your first reaction may be fear or concern, the language used by Christopher Beamon does not constitute a "threat." Beamon's subject matter was distasteful and inappropriate, but it was a story, not a threat. Sarah Boman's poem seems to be an easier case, because it was not personalized like Beamon's story. However, the mere fact that Beamon chose to write about his teacher and classmates does not mean that he threatened them.¹³⁹

Ponder High School officials disagreed and had Beamon arrested the next day. Under a directive from former Texas Governor George W. Bush not to take "hints of violence in schools" lightly, school officials felt pressure to react. Juvenile Court Judge Darlene Whitten ordered Beamon held for ten days, but he was released after five when Denton County prosecutors dropped the charges.¹⁴⁰

Violent imagery and strong language in the absence of a threat seemingly present the easy case, but these examples show how quickly school officials can impose discipline. Long-term exclusion for the language employed by Beamon or Boman can only stunt the student's creativity or increase lack of respect for authority. School officials reacted with punitive discipline in both cases, although they resulted in dropped charges or dismissal. School officials should carefully consider whether this type of violent expression masks a deeper problem and think before abridging student rights in the absence of action that clearly poses a threat.

D. The Cry for Help Masked as a Threat

Many statements labeled student threats can best be characterized as jokes or demands for attention. These students make outrageous claims without considering their effect, particularly when the assertions are not intended to be serious. Statements of this

138. *Halloween Essay Lands Texas Boy in Jail*, S.F. CHRON., Nov. 4, 1999, at A3.

139. How much weight should Beamon's demeanor (threatening or staring down the teacher or his classmates vs. calm and narrative) in delivering the story contribute to whether he deserves punishment?

140. *Halloween Essay Lands Texas Boy in Jail*, S.F. CHRON., Nov. 4, 1999, at A3.

type present the greatest challenges for educators because, if taken at face value, they undermine the sense of safety within the school. Often, an investigation into the facts of these threats will show a lack of intent or capability to complete the threat, and the student can be referred for counseling or other more constructive forms of discipline.

School officials are split over whether incidents involving students who prepared hit lists, without any claimed intention to carry out the threat, merit discipline. Many schools consider suspension or expulsion the appropriate discipline. For example, a sixth grader was suspended for compiling a hit list of twelve students after those students harassed, beat, and threw dog manure at him.¹⁴¹ Other schools take a more balanced view, disciplining students without resorting to suspension or expulsion.¹⁴² However, milder forms of discipline may expose school officials to harsh criticism from teachers' unions or parents.¹⁴³

Consider the following situations, based on real events:

(a) You are a teacher informally speaking with a student. On prior occasions, you know that this boy set his pants on fire, threatened suicide, and failed to take his medication. The student sticks a straight pin through his tongue and casually works it around in his mouth as he speaks to you. You persuade him to remove it and he asks for a safety pin to put in its place. Then he asks what would happen to a student who threatens a teacher.¹⁴⁴ What do you do?

The student involved in this incident immediately received a temporary suspension, but this is not an inevitable result. For implied threats like this one, a short suspension may be appropriate to allow

141. See Anthony Parrish, *Wrong Sixth-Grader was Suspended*, SUN-SENTINEL (Fort Lauderdale), Dec. 23, 1999, at 18A (editorializing that the boy should not be punished for merely letting off steam). The school did not suspend the students who provoked the incident. See also Meg Jones, *Girl, 16, Sentenced to Year's Supervision Over Hit List: Monona Grove High School Student Told Investigators She Planned Killings, Suicide*, MILWAUKEE J. SENTINEL, Dec. 2, 1999, at 2 (ordering student to continue her education at home despite a psychological evaluation which determined the girl probably would not have harmed anyone).

142. See, e.g., Megan O'Matz, *2 Pupils Disciplined but not Expelled for 'Hit Lists'*, CHI. TRIB., Feb. 3, 2000, at 3L (finding that students in separate hit list incidents did not intend to harm anyone and expressed remorse about the incident).

143. See, e.g., Harriet Ryan, *Union Questions Action on Threat*, ASBURY PARK PRESS (Neptune, N.J.), Aug. 20, 1999, at B1 (criticizing school board for transferring, rather than expelling, student who penned a hit list); Lisa Sink, *Reaction to Bomb Talk Angers Girl's Mother: Charges Dismissed Against Boys Who Student Said Spoke of Blowing up School*, MILWAUKEE J. SENTINEL, Jul. 28, 1999, at 1 (criticizing judge who allowed boys who talked about bombing the school to return and endorsed a free-speech right to talk hypothetically about bombing their school).

144. See Gibbs, *supra* note 110, at 74-75.

administrators, teachers, counselors, and parents to determine the facts and consider a course of action. If the teacher already maintains a good rapport with the student, it may be best handled through individual counseling by the teacher or an intervention with the student's counselor. To the greatest extent possible, parents, teachers, and school administrators should work together in deciding the best course of action for both the student and the school.

(b) You teach fifth grade at Sutton Elementary School and one of your students, DeJuan, was assigned detention by a teacher named Nikki for failing to line up properly at recess. DeJuan returns to his desk and starts writing and drawing on a sheet of paper. Because you have worked with him on anger management, you know that he is angry. During recess, another student tells you that DeJuan brought a gun to school, but you decide to let him settle down. Later, you approach DeJuan and confiscate what turns out to be a toy gun along with the paper on which he had drawn and written.

The drawing depicts a person lying in a horizontal position with an arrow pointing to the figure with the caption "that is Nikki!!" Another person stands over the first person, holding a gun and saying "hu hu hu," but the words are somewhat illegible. Above the drawing, DeJuan wrote, "I wich [sic] that all the teachers' [sic] were dead who [sic] at Sutton. And some of the students'[sic] I hit to [sic]! And I wich [sic] Nikki was dead to [sic]. Nikki the teacher who is across the hall. I mean Nikki across the hall!!"¹⁴⁵

What is the appropriate response?

School officials suspended DeJuan Trammell for five days, but he never returned to Sutton Elementary.¹⁴⁶ Police were also notified about the incident and, although Trammell was not arrested that day, he was later adjudicated to be a delinquent for making "terroristic threats."¹⁴⁷ Trammell challenged the sufficiency of the evidence to support his adjudication of first-degree terroristic threats.¹⁴⁸ After stating its regrets, the Arkansas Court of Appeals held that Arkansas Rule of Criminal Procedure 33.1(b)¹⁴⁹ precluded appellate review

145. Trammell v. State, 16 S.W.3d 564, 565-66 (Ark. Ct. App. 2000) (emphasis omitted).

146. *Id.* at 565.

147. *Id.* "A person commits the offense of terroristic threatening in the first degree if . . . [w]ith the purpose of terrorizing another person, he threatens to cause physical injury or property damage to a teacher or other school employee acting in the line of duty." ARK. CODE ANN. § 5-13-301(a)(1)(B) (1997).

148. Trammell, 16 S.W.3d at 565.

149. Arkansas Rule of Criminal Procedure P.33.1(b) contains the following provision:
In a nonjury trial, if a motion for dismissal is to be made, it shall be made at

because Trammell failed to renew his motion for directed verdict at the close of all of the evidence.¹⁵⁰

(c) You are the vice-principal at Washington High School and a teacher approaches you after confiscating a hit list that was circulating during her class. The list contains two columns: one with the name of another student, the other with the reason the authors do not like the person, such as "Doesn't say hello" or "He bugs me." One of the girls tells you the list contained people they wanted to slap, not kill, and you believe the two girls who wrote the list did not actually intend to kill anybody.¹⁵¹ How would you respond?

Despite protestations from her father that the list was a joke and the district overreacted, one of the girls was suspended for one semester and permanently banned from Washington High School.¹⁵² The difficulty with hit lists is that they expressly state an intention to kill or injure other students. Once caught, the student who pens a hit list will likely deny any intention to kill other students. On the other hand, hit lists which are not communicated to other students do not meet the "substantially disrupts" standard of *Tinker*. Similarly, if no other evidence is uncovered which corroborates an intention to kill from a hit list, the *Brandenburg* test¹⁵³ is not satisfied. Composing a hit list will almost certainly provide reasonable suspicion to school officials to justify a search. If a search reveals no further evidence, a short suspension may be warranted to guarantee safety, but a longer period of exclusion is not justifiable.

(d) You are a parent and your seven-year-old daughter has just finished reading *Harriet, the Spy*. The book contains the following passage, "She had a chemistry set and planned one day to blow up the world."¹⁵⁴ Within days, your daughter announces her intention to blow up a classmate's house. Understandably terrified, the other child tells her parents, who in turn notify the school, and a meeting is

the close of all of the evidence. . . . If the defendant moved for dismissal at the conclusion of the prosecution's evidence, then the motion must be renewed at the close of all of the evidence.

ARK. R. CRIM. P. 33.1(b).

150. *Trammell*, 16 S.W.3d at 567.

151. See Judi Villa, 2 *Girls Suspended for Having 'Hit List'*, ARIZ. REPUBLIC, Dec. 4, 1999, at A4.

152. See *'Hit List' Gets Girl Banned from School*, ARIZ. REPUBLIC, Dec. 22, 1999, at B3.

153. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Recall that the *Brandenburg* test allows the state to proscribe advocacy of the use of force or violation of law if it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.*

154. FITZHUGH, *supra* note 95, at 29.

called. Did you know that your daughter was talking about detonating a bomb? What is your reaction and how do you think school authorities should respond?¹⁵⁵

Apparently, nothing came of this situation as everyone involved realized the "threat" to be the misguided utterance of an impressionable mind. The parents of the threatened child correctly notified the school, and the school called a meeting. This response allowed all of the involved parties to discuss the matter, place it in perspective, and decide on a workable solution.

These threats should raise immediate concerns with parents, teachers, school counselors, and other students. It is essential to remember that none of these situations escalated beyond words spoken or written on a page. A temporary suspension may be required to allow the school to maintain safety and thoroughly investigate the facts. Before disciplining a student who makes this kind of threat, school officials should notify the parents of the targeted kids and the student who made the threat. School officials should commit to open dialogue and promote the free exchange of information.¹⁵⁶ Immediately notifying the police may be counterproductive until it is firmly established that the student intended to harm himself or someone else.

On one level, parents and teachers should feel relief in each of these situations since they have successfully intervened before a student's words turned to violence. It is unquestionably frightening and cause for concern that a student considered harming his classmates or teachers. If the appropriate measures are undertaken, there is no reason to believe the incident will progress beyond words. Instead of intervening in a positive way, however, many school officials impose discipline and involve law enforcement before considering counseling.¹⁵⁷ Since one of the goals of an effective school should be to prepare its students to enter society, students

155. See Jean Hanff Korelitz, *How Well Can We Ever Know Our Kids?*, NEWSWEEK, Mar. 6, 2000, at 10. Ms. Korelitz, who experienced this situation, stated that her first reaction was to laugh the incident off as a colossal misunderstanding. Although nothing catastrophic occurred here, she realized, like the parents of Eric Harris and Dylan Klebold, a parent's capacity for denial.

156. Cf. *Response to a Hit List of Classmates*, INDIANAPOLIS STAR, Jan. 6, 2000, at A15. The school failed to notify the parents of the targeted kids after a student was expelled for drawing up a hit list. The student claimed his father had lots of guns, showed other students pictures of guns from magazines, and claimed to know how to use the weapons. *Id.*

157. See *supra* notes 120-122, 129 and accompanying text.

should be counseled before it becomes necessary to resort to expulsion or criminal charges.

E. Punishing Outright Threats of Violence

When a student can plausibly carry out a threat, school officials must be able to fully investigate the matter to insure student safety. Depending on the gravity of the situation, proper measures may include: isolating the child; calling the parents of all involved parties, including the student threatened; and notifying law enforcement.

Consider the following: You are a school administrator and three boys notify you that "Derik" tried to recruit them to blow up the school. You know that it is common for students to jokingly say they want to blow up the school. Derik is seventeen years old and a "B" student with no discipline problems. Because he is depressed and overweight, jocks tease him. About three weeks ago, Derik began to wear all black.¹⁵⁸ Would you recommend removal for Derik?

What if police found no weapons in his home? Would you recommend a stronger course of action if police found no weapons, but did find a diary detailing his plan, a floor plan of the school with written notes of where he wanted to attack, and bomb-making directions downloaded from the Internet?¹⁵⁹ Would it have made a difference if these plans were discovered before Derik revealed them to anyone else?

Derik Lehman actively recruited other students to help him blow up the school and, fortunately, those students did not have weapons and chose instead to report the incident to the principal rather than assist him. While it is inappropriate to profile students based on what they wear, this express threat provides reasonable suspicion for further investigation. If weapons or even plans for a bombing are discovered, the *Brandenburg* definition of a threat is satisfied. This type of threat falls into the same category as when school officials discover weapons in the student's possession or locker on school grounds and zero tolerance is appropriate. This school was fortunate enough to catch the student before violence erupted, but this situation did not need to proceed much further before another Columbine-like disaster resulted.

158. See Scott Travis, *Classmates Say They Didn't Take Threats Seriously*, SUN-SENTINEL (Fort Lauderdale), Feb. 5, 2000, at 1B.

159. See Scott Travis, *Student, 17, Charged in Columbine-Like Plot*, SUN-SENTINEL (Fort Lauderdale), Feb. 11, 2000, at 5B.

This hierarchy of threatening speech provides a useful framework to enable educators to move beyond mechanical application of zero-tolerance policies. Any threat, express or implied, should be carefully considered, but this analysis should not ignore the rights of the student accused. Common sense and a realistic approach to discipline need not be absent beyond the schoolhouse gate. By accounting for the rights of all involved and utilizing exclusion as a last resort, schools can ensure safety and protect children who need counseling, not punishment.

III. Lower Court Confusion over What Constitutes a "Threat"

Society as a whole demands that greater restrictions be placed on children to ensure their safety. To make this clear, the United States Supreme Court has stripped public school students of freedoms they once enjoyed. Caught between these trends are lower courts presented with claims by students that schools have violated their constitutional rights. To date, only a handful of cases involving prosecutions for threatening language, without recovery of weapons or other incriminating evidence, have reached the appellate courts. Examination of two of these cases demonstrates the confusion in the lower courts over what constitutes a "threat."

A. *In re B.R.*¹⁶⁰

In Allegheny County, Pennsylvania, B.R. was adjudicated delinquent for making terroristic threats¹⁶¹ to Mr. Hudak, a teacher assigned to monitor B.R., and two other students as they awaited a meeting with the principal.¹⁶² Mr. Hudak testified both "that the

160. 732 A.2d 633 (Pa. Super. Ct. 1999).

161. A person is guilty of the misdemeanor of making terroristic threats if he or she threatens to "(1) commit any crime of violence with intent to terrorize another; (2) cause evacuation of a building, place of assembly, or facility of public transportation; (3) otherwise cause serious public inconvenience, or in reckless disregard of the risk of causing such terror or inconvenience." 18 PA. CONS. STAT. ANN. § 2706 (West 1983 & Supp. 1999). Specifically, B.R. talked about bringing a gun to school and announced he would "bring a can of black spray at the end of the school year and spray the camera and then go into Mr. Wilson's office and destroy the main communications." Mr. Hudak asked them to terminate their discussion, but a few minutes later S.S., another boy present, said, "yeah, I'm going to bring a gun to school; I'm going to shoot Mr. Wilson and line up all the other teachers and shoot them." *In re B.R.*, 732 A.2d 633, 635 (Pa. Super. Ct. 1999).

162. *B.R.*, 732 A.2d at 635. Following the adjudication of delinquency, the court placed B.R. on informal probation and ordered him to continue ongoing counseling.

threatening statements appeared to be directed to him" and "that he was concerned by the statements."¹⁶³

In upholding B.R.'s adjudication of delinquency, the court did not construct the statute to require either the ability to carry out the threat or a belief by the person threatened that it will be carried out.¹⁶⁴ The trial court gave great weight to Mr. Hudak's testimony that his concern about B.R. bringing a gun to school was acute since the statement occurred shortly after a student shot a teacher at a dance in Edinboro, Pennsylvania. "The trial judge also took judicial notice of a 'climate of apprehension' that existed at the time as a

163. *Id.*

164. *See id.* at 636. *See also In re R.P.*, No. C2-00-215, 2000 Minn. App. LEXIS 939, at *3 (Minn. Ct. App. Aug. 29, 2000). The court in *R.P.* found that:

[a] threat is a declaration of an intention to injure another or his property by some unlawful act. The test of whether words or phrases are harmless or threatening is in the context in which they are used. Thus the question of whether a given statement is a threat turns on whether "the communication 'in its context' would 'have a reasonable tendency to create apprehension that its originator will act according to its tenor.'"

Id. (quoting *State v. Schweppe*, 237 N.W.2d 609, 613 (Minn. 1975) (quoting *United States v. Bozeman*, 495 F.2d 508, 510 (5th Cir. 1974))).

R.P. was adjudicated delinquent for making terroristic threats under Minnesota Statute section 609.713, subdivision 1, which defines terroristic threats as threatening "to commit any crime of violence with purpose to terrorize another . . . or in a reckless disregard of the risk of causing such terror." Four students testified that R.P. made statements during a broadcast about the Columbine incident that frightened them, including the following: "If you want me to shoot you, too, I could do that"; "If I wanted to, I could come back and shoot you in the head"; and "Do you want me to f—ing blow your head off just like they did?" *R.P.*, 2000 Minn. App. LEXIS 939, at *4. R.P. denied the charges and testified that he expressed his opinions only during a teacher-led discussion about the Columbine incident. *Id.* The court affirmed the adjudication on the basis that a reasonable fact-finder could find that R.P. made terroristic threats. *Id.* at *4-5.

The dissenting judge wrote that "we must proceed with caution when criminal convictions are based on speech, particularly when the speech presents an unpopular opinion arising out of a classroom discussion." *Id.* at *5 (Klaphake, J., dissenting). Judge Klaphake offered a different version of the facts:

We have here a young man, apparently not well known to his classmates, who takes an unpopular stance in a classroom discussion during an emotional period for school children. Even assuming that he made one or more of the statements attributed to him in the different versions offered to the court, the statements are conditional at best, and do not reflect a continuing pattern of behavior directed against his classmates. R.P. did not initiate the discussion and his comments were apparently an isolated incident that arose only because of the context. As Mr. Justice Sheran wrote in his well-reasoned dissent, "[The drafters of the Model Penal Code] did not contemplate that [Section 609.713, subdivision 1] would be utilized to punish behavior that might consist of nothing more serious than a flippant remark or an outright joke."

Id. at *7-8 (Klaphake, J., dissenting) (quoting *State v. Taylor*, 264 N.W.2d 157, 160 (Minn. 1978). (Sheran, J., dissenting)).

result of recent school-related shootings by students which were prominent in the news.”¹⁶⁵ The court distinguished a pair of cases reversing convictions under the terroristic threats statute because transitory anger in the spur of the moment produced those threats.¹⁶⁶ Unlike those cases, “these statements were delivered by B.R. in a deliberate, matter of fact manner only after the boys had talked among themselves.”¹⁶⁷

The discussion between B.R. and his friend could be described as bravado or an outlet for their anger on being sent to the principal's office. Therefore, it most likely qualifies as a cry for help masked as a threat.¹⁶⁸ While more serious than a seven-year-old's statement of intention to blow up a friend's house,¹⁶⁹ it is not more serious than casually threatening a teacher or penning a hit list stating reasons why a classmate is disliked.¹⁷⁰ The court failed to recognize that B.R. has rights, may need counseling, or may simply need more attention at home or in school. Instead, the *B.R.* court justified B.R.'s removal

165. *B.R.*, 732 A.2d at 637. This shooting occurred on April 25, 1998, approximately one month after the mass shooting in Edinboro. See *supra* notes 99-109 and accompanying text. Recognition by judges of this “climate of apprehension” may, unfortunately, serve as a rationale for upholding adjudications of delinquency for verbal threats. In a recent case involving a student bomb threat, Judge Tamilia of the Pennsylvania Superior Court noted:

This case presents one of the most serious, perplexing and accelerating forms of youthful conduct which society has faced in recent times. What was once the occasional bomb threat, telephoned to the principal's office to trigger a shut down of a school to obtain a day off or to avoid a test, has escalated to planned coordinated threats which no longer can be handled summarily, and in every instance, as a result of tragic occurrence throughout the country, must be treated by schools, police and emergency services as potentially serious. Whether the threat is real or fraudulent, the result is devastating to society and the social fabric of the entire community. This case illustrates the difficulty in balancing the non-lethal fraud perpetrated and the disproportionate disarray that results, requiring a definitive response from the court to balance the needs of the child with the protection of society.

In re J.C., 751 A.2d 1178, 1179 (Pa. Super. Ct. 2000) (emphasis added). Like in *B.R.*, the bomb threat in this case occurred only three days after the Columbine High School shootings. See *id.* at 1179 & n.2. Unlike the threat in *B.R.*, however, J.C.'s threat resulted in substantial disruption to the school, including evacuation of the school buildings. See *id.*

166. *B.R.*, 732 A.2d at 637-38. Neither involved children. See also *Commonwealth v. Sullivan*, 409 A.2d 888, 888-89 (Pa. Super. Ct. 1979) (reversing due to a lack of intent after defendant called the State Police Barracks and threatened to blow the sheriff's head off and then personally conveyed his desire to kill the Sheriff the next day); *Commonwealth v. Anneski*, 525 A.2d 373, 376 (Pa. Super. Ct. 1987) (reversing due to lack of intent after defendant confronted her neighbor and threatened to use a gun).

167. *B.R.*, 732 A.2d at 638.

168. See *supra* notes 141-157 and accompanying text.

169. See *supra* notes 154-155 and accompanying text.

170. See *supra* notes 142, 151-152 and accompanying text.

from school and subsequent adjudication of delinquency by focusing on the horror of prior school shootings and Mr. Hudak's fear stemming from a recent shooting at a nearby school. This rationale typifies the fear underlying zero-tolerance policies and the abridgment of student rights. A superior solution would permit school officials to briefly suspend B.R., investigate into facts of the threat, and propose a solution that would protect the well being of both B.R. and the school.

B. State *ex rel.* R.T.¹⁷¹

The Louisiana Court of Appeals recently reached the opposite result under similar statutes. Other students and faculty singled out R.T., a fifteen-year-old student at Jonesboro-Hodge High School, after the Columbine massacre because he wore dark clothing, listened to heavy metal music, and apparently had prior juvenile proceedings against him.¹⁷² As a result of his conversations with other students, R.T. was adjudicated delinquent for terrorizing¹⁷³ and for communication of false information of planned arson.¹⁷⁴ The trial court committed R.T. to the custody of the Department of Public Safety and Corrections for a period of one year.¹⁷⁵

The alleged communication of false information of arson occurred outside of school at the bus stop when J.W., another student, asked R.T. if he was going to "blow the school away." J.W. testified that R.T. replied, "I'm gone [sic] do it when everybody least expect [sic] it and kill as many people as [I] can." However, M.G., another student, overheard the conversation and testified that R.T.'s reply was only "Yeah I am." Neither of the boys missed school as a

171. 748 So. 2d 1256 (La. Ct. App. 1999).

172. See *id.* at 1258. R.T. testified that, after Columbine, students identified him as the person most likely to commit a similar crime at Jonesboro-Hodge High School. See *id.* For details surrounding the Columbine High School shooting on April 20, 1999, see *supra* note 96 and accompanying text.

173. Louisiana statutory law defines the crime of "terrorizing" as:
the intentional communication of information, known by the offender to be false, that the commission of a crime of violence is imminent or in progress . . . thereby causing any person to be in sustained fear for his or another person's safety; causing evacuation of a building, a public structure, or a facility of transportation; or causing other serious disruption to the public.

LA. REV. STAT. ANN. § 14:40.1(A) (West 1997 & Supp. 2000).

174. "Communicating of false information of arson or attempted arson is the intentional impartation or conveyance . . . of any threat or false information knowing the same to be false, including bomb threats . . . to commit either aggravated or simple arson."

LA. REV. STAT. ANN. § 14:54.1(A) (West 1997).

175. See *R.T.*, 748 So. 2d at 1259.

result of the remarks nor did they report the conversation to parents or school officials.¹⁷⁶

In reversing, the court found the facts insufficient to uphold R.T.'s adjudication of delinquency. The statute is "directed at communication or speech designed to stir others to fear a threatened arson or bombing and to react in a manner that disrupts or victimizes their lives."¹⁷⁷ The discussion about bombing the school was initiated by J.W., not R.T. Further, the state failed to show that R.T. never intended to bomb the school, as required by statute. Finally, neither J.W. nor M.G. acted consistently with feeling threatened by R.T.'s statement.¹⁷⁸

The terrorizing charge involved the conversation with J.W. and R.T.'s statement to C.M. during class that it would be easy to have a shooting in the biology class.¹⁷⁹ The court again constructed the statute to require an immediacy element that was not satisfied in this case.¹⁸⁰

The court also considered and rejected a facial challenge to section 14:54.1(A), finding the statute's requirement that victims receive a threat and react with a response, such as fear, to withstand scrutiny.¹⁸¹ The court recognized the difference between inchoate offenses and other penal laws, which typically do not implicate free speech concerns unless they directly target expressive conduct, such as obscenity laws.¹⁸² When the "overt acts" involved "include constitutionally protected speech or conduct, this Court has a constitutional duty to ensure that those rights are not impermissibly infringed."¹⁸³ "In other words, the [ordinance] must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected

176. *Id.* at 1258. R.T. testified that, when J.W. asked if was planning to blow up the school, he sarcastically said "Oh yeah," rolled his eyes, and walked away. *Id.*

177. *Id.* at 1261.

178. *See id.* at 1262.

179. *See id.* at 1258.

180. *See id.* at 1262. "[T]errorizing goes beyond R.T.'s speech and requires a showing that the horrendous crime he described was communicated as 'in progress' or 'about to exist' so as to cause any person like C.M. upon hearing of the crime 'to be in sustained fear.'" *Id.* at 1263.

181. *Id.* at 1261.

182. *See id.* at 1260 (distinguishing the Louisiana statute at issue in this case from the anti-pornography provision of the California Penal Code reviewed by the Supreme Court in *Miller v. California*, 413 U.S. 15 (1973)).

183. *Id.* at 1261 (citing *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57 (1973)).

expression."¹⁸⁴ Because the statute prohibits only unprotected "threats," section 14:54.1(A) is inoffensive to free speech.¹⁸⁵

State ex rel. R.T. involved a threat quite similar to the threat in *B.R.* Both students explicitly threatened to bring weapons to school and commit violence against others in the presence of other students or teachers. Perhaps *R.T.* can be distinguished because the threat was directed at another student, not a teacher, the statute expressly contained an immediacy requirement, and *R.T.* did not initiate the "threat," while *B.R.* did. The factual similarities between these two cases help to explain why it is quite confusing to define what a threat means. What constitutes a threat in *Brandenburg*, which applies to adults, may require a completely different definition when applied to children, particularly in light of *T.L.O.*, *Fraser*, *Kuhlmeier*, and *Vernonia*. Add to that atmosphere Columbine and the other recent massacres and many courts may be willing to suspend the rights of students. Both *B.R.* and *R.T.* presented threats with no corroboration of intent to harm, and both should have required reversal of the adjudication of delinquency, if the complaint should have been filed in the first place.

The confusion and conflicting results reached by these courts demonstrates the inadequacy of relying on judicial remedies. Supporters of judicial deference argue that children are not fully persons for constitutional purposes.¹⁸⁶ Schools need not tolerate individual speech since value inculcation and social integration are the core traditions of American public education.¹⁸⁷ Courts have a difficult time making the complex empirical conclusions about the functions of schools and judges will improperly rely on their personal value judgments.¹⁸⁸ Finally, elections to local boards of education provide the community with ideological diversity and questions of school governance are best left to the political process.¹⁸⁹

Critics of deference argue that the only remedy for losers in the political battle for control over education is to appeal to the courts.¹⁹⁰ Now that these issues are beyond political control, "the courts have

184. *Id.* (citing *Gooding v. Wilson*, 405 U.S. 518, 522 (1972)).

185. *See id.* at 1261.

186. *See* David A. Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 495 (1981).

187. *See id.* at 499.

188. *See id.*

189. *See id.* at 509.

190. *See* Tyll van Geel, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 TEX. L. REV. 197, 199-200 (1983).

inadequately protected the interests of students in freedom of belief and have granted too much weight to government's claimed interest in inculcating and indoctrinating youth."¹⁹¹ These arguments strike at the center of the debate over who should control American public schools. No matter which side is correct, it should be clear that the judiciary either will not or cannot protect the fundamental freedoms of students.

IV. Community Solution

"We look forward to the day when the knowledge and experience of parents, teachers, psychiatrists and law enforcement officials can, through a comprehensive effort, render violence in schools or threats of violence . . . nonexistent."¹⁹² Educators are beginning to recognize that suspensions, expulsions, and office referrals do not make schools safer. Instead, an emphasis on proactive approaches to discipline increases safety and reduces the number of necessary punitive measures.¹⁹³ Parents and students should also recognize that courts cannot provide the most effective remedies. This section explores some of those approaches, identifying problems and effective community responses.

A. Students

Schoolchildren in the United States have more access to information than at any other time in history. Combined with the staggering economic power children wield, many teenagers and pre-teens engage in behavior that can be characterized as adult. "Psychologists worry that in their rush to *act* like grown-ups, these kids will never really learn to *be* grown-up, confusing the appearance of maturity with the real thing."¹⁹⁴ Society seems to both embrace and condemn this trend. While children are connected to the world, they may fail to become grounded and experience a sense of community. Adults send mixed signals to children about what behavior is appropriate, leaving children to grapple with many developmental issues on their own. Yet the moment violence erupts, parents and other "responsible" adults are quick to point the finger at television, music, movies, video games, and the Internet. The real

191. *Id.* at 203.

192. *In re B.R.*, 732 A.2d 633, 639 n.7 (Pa. Super. Ct. 1999).

193. See EARLY WARNING, *supra* note 130, at 21.

194. See Barbara Kantrowitz & Pat Wingert, *The Truth About Tweens*, NEWSWEEK, Oct. 18, 1999, at 62, 64-65.

questions should be, who is raising our children and why are we allowing it to happen this way?

The 27 million children in the United States between the ages of eight and fourteen, known to marketers as "Tweens," "are a generation stuck on fast forward, children in a fearsome hurry to grow up."¹⁹⁵ These are children of privilege, highly impressionable, with large amounts of disposable income, and marketers rush to win their affections. Tweens spend close to fourteen billion dollars a year in the United States and still have most of their purchases ahead of them.¹⁹⁶ With parents out of the house, Tweens emulate adult images in the media, filling their time with the World Wide Web and Pokémon, a world beyond the comprehension of most parents.¹⁹⁷

The homogenization of American communities and the Internet stunt the ability of children to determine what makes them unique. Because young minds lack the capacity or experience for perspective or to appreciate individual differences, they become obsessive and develop deep insecurities.¹⁹⁸ Overcoming these traits and integrating into society requires a support system that promotes a sense of community. These needs are unfulfilled by communities that encourage conformity rather than diversity. Nearly every suburban area today is identical, containing the same coffee shops, restaurants, and video rental stores. Similarly, the Internet encourages children to look inward rather than toward developing social skills. Although the Internet is a powerful tool, it allows unlimited access to information that may be inappropriate for children unless filtered through an adult mind. Many parents do not understand the Internet or other interests of their children and acquiesce in whatever their children are doing.

Out of necessity, many children are forced to assume adult responsibilities before they have a chance to grow into adults. In 1998, twenty-seven percent of children under the age of eighteen lived in a single-parent household.¹⁹⁹ More than fifty-two percent of both males and females, between the ages of sixteen and nineteen,

195. *Id.* at 64.

196. *See id.* at 65.

197. When asked where they learn, 49% of 10- to 15- year-olds claim to learn a lot from television, compared with 41% saying the same about school, 38% from their mothers, 35% from the Internet, and 31% from their fathers. *See id.* at 67.

198. David Elkind describes this phenomenon as "the belief in the imaginary audience," which causes young people to personalize trivial matters and blow them out of proportion. *See* DAVID ELKIND, ALL GROWN UP AND NO PLACE TO GO: TEENAGERS IN CRISIS 59, 109-13 (1984).

199. *See* STATISTICAL ABSTRACT, *supra* note 115, at 67.

participated in the labor force.²⁰⁰ Over fifty-four percent of girls, between the ages of fifteen and nineteen, have had at least one sexual partner, and thirty percent had their first sexual intercourse by the age of sixteen.²⁰¹ In 1997, 12.8% of all babies were born to teenage mothers and children under nineteen had 274,000 abortions, a figure representing twenty percent of all abortions in the United States.²⁰² Nearly forty percent of children between the ages of twelve and seventeen tried alcohol and cigarettes and nearly nineteen percent experimented with marijuana.²⁰³

These trends reveal that children not only emulate adult behaviors, but also assume the roles of parent and provider in many families. These children lose the opportunity to be children and may fail to develop into mature and responsible adults. Children are ill-suited to burden adult responsibility and its attendant stress. When these pressures are thrust upon a young mind, deprived of alternative outlets, violence or threatening behavior may be a natural reaction.

This is not designed as an apology for school shootings, as schools should not be expected to tolerate possession of weapons or other contraband by students. But given the weight placed on the shoulders of many students, adults must reassess their expectations of children and how to guide them to meet those goals. Parents should not abdicate their responsibility to the schools, the media, or the marketing machine. Likewise, schools should not abdicate their responsibility to the criminal justice system. The temptation to surrender is great when faced with the senseless and shocking violence perpetrated by seemingly normal children. But children exhibit warning signs and society must strive to recognize them through community solutions.

B. Parents

The horror of the school shootings "is double-edged. As parents we must look at our children and wonder, Will someone shoot them at school? And then we must look at our children and wonder, Will they do the shooting?"²⁰⁴ The best preventive measure for parents is to know their children. They should be receptive to their attempts to communicate, get to know their friends, and maintain interest in their

200. *See id.* at 416.

201. *See id.* at 85.

202. *See id.* at 79, 91.

203. *See id.* at 152; *See generally* ELKIND, *supra* note 198, 109-35 (discussing the various responsibilities and stresses placed on children).

204. *See* Belkin, *supra* note 96, at 94, 100.

lives.²⁰⁵ React warmly when your child reaches out, pay attention, make eye contact, and *interact*.²⁰⁶ We may read the stories that the parents of Eric Harris and Dylan Klebold never saw the terror their sons would cause coming with shock or disbelief.²⁰⁷ Or believe that Jean Hanff Korelitz' recognition of her capacity for denial does not apply to us.²⁰⁸ However, the sad reality is that it can happen anywhere and to anyone.

Most parents in today's world find it difficult to monitor their children, since parents and children spend little time in the home together. In 1998, both parents worked in 64.1% of married couples with children under the age of eighteen. In single-parent families, 71.8% of mothers and 85.5% of fathers worked.²⁰⁹ This lack of presence in the home causes parents to feel guilt, which many compensate for by purchasing for their children anything they want.²¹⁰ This helps to explain why the average yearly cost of raising a child between the ages of twelve and seventeen in 1998 was around \$7000 for families with income of less than \$36,000; over \$9000 for families with income between \$36,000 and \$60,600; and over \$13,000 for families with incomes greater than \$60,600.²¹¹ It currently costs parents in the lower income brackets \$126,000 and those in higher income brackets \$234,000 to raise a child from birth to the age of eighteen. According to researchers, overly compliant parents distort a child's view of their place in the world and give them a false sense of power.²¹²

"Students whose families are involved in their growth in and outside of school are more likely to experience school success and less

205. See 145 CONG. REC. S5418 (daily ed. May 17, 1999) (statement of Sen. Byrd).

I call upon parents to be alert and active participants in their child's education—whether it means attending parent-teacher conferences or reviewing their child's math assignments. Parents should strive to know their children inside and out—their temperament, their habits, their strengths and their weaknesses. And they should make it a priority to know their children's friends and the parents of their children's friends.

Id.; see also DR. WM. LEE CARTER, *THE ANGRY TEENAGER* 214 (1995) ("The teen who feels no parental understanding has limited choices about how important decisions will be made.").

206. Lee Carter refers to this type of interaction as being "your family's weather expert." CARTER, *supra* note 205, at 238-45.

207. See *supra* notes 96, 105-109 and accompanying text.

208. See *supra* note 155 and accompanying text.

209. See STATISTICAL ABSTRACT, *supra* note 115, at 418.

210. See Kantrowitz & Wingert, *supra* note 194, at 66.

211. See STATISTICAL ABSTRACT, *supra* note 115, at 470.

212. See Kantrowitz & Wingert, *supra* note 194, at 68.

likely to become involved in antisocial activities.”²¹³ But many parents today are ill equipped to provide the protection, guidance, and instruction necessary to prepare their children for adulthood. The low numbers of parents who volunteer time at their child's school reflects this trend. For elementary school students (kindergarten through fifth grade), only 54.9% of adults in two-parent families and 36.4% in one-parent families volunteered their time. The numbers drop to 34.7% for two-parent families and 21.5% in single-parent families as children reach middle school (sixth to eighth grade).²¹⁴ A possible explanation for this problem is that many American adults are primarily interested in “self-fulfillment,” fixated on themselves rather than their families.²¹⁵ Additionally, society has changed rapidly over the past few years, becoming based more on the Internet and information technology. Rapid societal change confuses even committed parents about what limits are necessary and what values are important.²¹⁶

It is an absolute necessity for parents to take the lead in helping to prepare their children to become positive contributors to society. Some experts focus on the fact that parents do not have a duty to prevent their children from committing violent acts, while others acknowledge that most parents have an opportunity, if not a duty, to monitor their children.²¹⁷ Whether or not a legal duty exists, parents have both an opportunity and a moral obligation to monitor their children. By remaining interested in a child's life, encouraging frank and open discussion, and setting clear limits, parents can create a structure that enables a child to make appropriate decisions.²¹⁸ In

213. EARLY WARNING, *supra* note 130, at 3.

214. See STATISTICAL ABSTRACT, *supra* note 115, at 173. A higher percentage of adults attend meetings at school, but it is unknown whether attendance is compulsory. For elementary school students, 87% of adults in two-parent families and 74.8% in single parent families attended at least one meeting at school. In middle school, 81.9% of adults in two-parent families and 70% of adults in single parent families attended meetings. *Id.*

215. See ELKIND, *supra* note 198, at 10-12; DAVID YANKELOVICH, NEW RULES 3 (1981); JOHN NAISBITT, MEGATRENDS (1982).

216. See ELKIND, *supra* note 198, at 13.

217. See Belkin, *supra* note 96, at 65. Compare the statements of Martin Guggenheim, NYU Law School professor of clinical law (“Parents do not have a duty to the community at large to keep their children from engaging in dangerous acts and inappropriate activity unless the parents aided and abetted the child”), with Michael Breen (“Given the pervasive availability of information and data, given what kids can get over the Internet, I think the parents’ obligation to monitor their children’s activities has increased proportionally”). *Id.* at 65, 100.

218. It is extremely important to do more than just create rules and set limits. As William Damon, head of the Stanford University Center on Adolescence, points out, “If all you’re giving kids is constraint and censorship, you’re setting your kids loose into a

undertaking these simple measures, it is hoped, parents can avoid subjecting their children to the horrors of Columbine, West Paducah, or Springfield, either as a victim or assailant.

C. Teachers, Schools, & Communities

Ideally, schools should convey an attitude that facilitates academic achievement, disciplined behavior, and respect for individuality. This can be accomplished by ensuring that adults have opportunities to make personal connections with children and teaching children appropriate strategies for managing emotions, expressing anger, and resolving conflicts.²¹⁹ One important consideration is that students are constantly undergoing and adjusting to changes in their minds and bodies. Adults must be careful not to mistake awkwardness in thinking, manifested by insensitive remarks or threatening words, as anything more than the inexperience of youth.²²⁰

As authority figures, teachers face challenges incommensurate with the average salary of \$40,133 received in 1998.²²¹ Some students do not come to class at all or, when they do, they arrive late. In class, students talk back or curse at teachers. Teachers can send disruptive students to the principal, but run the risk of having them return with a grudge. Some teachers decline to assign homework because students will not do it and will flunk the class. Failing students is not a viable option since high failure rates incur the wrath of school administrators.²²²

"Teachers, like parents, have always faced the tension between roots and wings: how to keep kids safe and grounded; how to let them stretch and fly."²²³ The interests of the teacher and a disruptive student may sometimes be in direct conflict. The teacher must be concerned with his or her own personal safety, the safety of the class, and a modicum of order that facilitates effective teaching.²²⁴ In the

risky world and robbing them of your positive guidance." Kantrowitz & Wingert, *supra* note 194, at 72. One psychologist suggests that the appropriate parental response to wrongdoing by their child must be emotionally controlled. See CARTER, *supra* note 205, at 232.

219. See EARLY WARNING, *supra* note 130, at 3-4.

220. See ELKIND, *supra* note 198, at 24.

221. See STATISTICAL ABSTRACT, *supra* note 115, at 180.

222. See Gibbs, *supra* note 110, at 68.

223. *Id.* at 69.

224. For these reasons, the collective bargaining agreements for teachers' unions in many cities recognize explicitly "that schools first and foremost need to be safe, orderly and clearly focused on students mastering core academic knowledge and skills." To

balance between the liberty interests of students to speak freely and society's need for safety and order in the classroom, teachers are the fulcrum. Teachers perform the inculcative function for the state, instilling values and preparing students to become productive members of society. Aside from fellow students, teachers are most likely to be the first to recognize signs of disruption and threats to the school's orderly function. Teachers, then, have the choice between making solid and caring connections with their students or serving as the instrument for placing the school's disciplinary arm in motion.

"Effective schools recognize the potential in every child to overcome difficult experiences and to control negative emotions."²²⁵ The U.S. Department of Education has established a list of early warning signs that can aid educators in determining whether a child requires an increased level of attention.²²⁶ These signs are not indicators that a child will become violent toward one's self or others and should not be used as the basis for exclusion, isolation, or punishment of students.²²⁷ To be effective, schools should train the

implement these goals, the agreements advocate suspension for "[d]isruptive behavior or willful defiance of valid authority" and "[c]ausing, attempting or threatening violence or physical injury." Dept. of Research and Dept. of Education Issues, American Federation of Teachers, *Sample Contract Language From AFT Contracts by Topic: Discipline and Safety*, at <http://www.aft.org/research/models/language/index.htm> (last visited July 16, 2001) (collecting collective bargaining agreements for Los Angeles, CA; Hartford, CT; Dade County, FL; Chicago, IL; Hammond, IN; New Orleans, LA; Minneapolis, MN; New York, NY; Rochester, NY; Cincinnati, OH; Toledo, OH; and Pittsburgh, PA). These measures mirror many of the vague zero-tolerance policies schools have adopted for "violence."

225. EARLY WARNING, *supra* note 130, at 12.

226. Early warning signs include social withdrawal; excessive feelings of isolation and being alone; excessive feelings of rejection; being a victim of violence; feelings of being picked on and persecuted; low school interest and poor academic performance; expression of violence in writings and drawings; uncontrolled anger; patterns of impulsive and chronic hitting, intimidating, and bullying behaviors; history of discipline problems; past history of violent and aggressive behavior; intolerance for differences and prejudicial attitudes; drug use and alcohol use; affiliation with gangs; inappropriate access to, possession of, and use of firearms; and serious threats of violence. See *id.* at 8-11. See also National School Safety Center, *Checklist of Characteristics of Youth Who Have Caused School-Associated Violent Deaths*, at <http://www.nssc1.org> (last visited Mar. 5, 2000); Office of Safe and Drug-Free Schools, *Fact Sheet #3: Early Warning Signs*, at <http://www.safeschoolswichita.com/98-08.htm> (last visited Mar. 5, 2000) (identifying behaviors which could indicate a youth potential for harming him/herself or others).

227. EARLY WARNING, *supra* note 130, at 7, 12. *State ex rel. R.T.* exemplifies the improper use of warning signs where students and school officials inappropriately labeled a student because he appeared to fit a specific profile or set of early warning indicators. See *supra* text accompanying notes 171-185. Cf. Office of Safe and Drug-Free Schools, *Fact Sheet #7: Imminent Warning Signs*, at <http://www.safeschoolswichita.com/99-01.html> (last visited Mar. 5, 2000) (recommending immediate action if a student exhibits the

entire community, including parents and students, to identify and properly interpret warning signs. When warning signs are observed, reporting should be encouraged²²⁸ and specialists should be made available before violence erupts.

One positive approach is to place more emphasis on conflict resolution. A middle school in Indiana has introduced character education into the curriculum and started Project PEACE—Peaceful Endings through Attorneys, Children, and Education—a dispute resolution program that involves teachers, parents and local attorneys.²²⁹ Others schools intervene with a “Safe Team,” which includes all of a student’s teachers, a guidance counselor, the school’s social worker, and its police liaison officer.²³⁰ Some school districts, including Chicago, Milwaukee, San Diego, and Philadelphia, have turned to military officers, lawyers, and government officials to provide fresh perspectives on leadership. The Orleans Parish School Board in New Orleans hired Al Davis, a 27-year Marine veteran, to lead with a goal-oriented military approach and a soft heart. Davis encourages business people to volunteer in the schools for two hours a month.²³¹

When a student pens a hit list or threatens another student, schools should resist the urge to react with suspension or expulsion.²³² If threats are consistently directed at specific individuals, it may signal emotional problems and a potential for violence. However, as this Note demonstrates, there is a danger of misdiagnosis in violent

following behaviors: serious physical fighting with peers or family members; severe destruction of property; severe rage for seemingly minor reasons; detailed threats of lethal violence; possession and/or use of firearms and other weapons; and other self-injurious behaviors or threats of behavior).

228. “It is very important that children feel safe when expressing their needs, fears, and anxieties to school staff.” EARLY WARNING, *supra* note 130, at 4. There are many ways to increase reporting, including posters which encourage students and others to share information, telephone tip lines, and rewards for reporting students who exhibit warning signs. See, e.g., Carlos Illescas, *School Threats Now Taken Very Seriously But Some Complain Policies Impede Free Speech*, DENVER POST, Nov. 22, 1999, at B-01; Gibbs, *supra* note 110, at 75 (creating a “Principal’s Student Leadership Group,” a committee of 60 students to, among other duties, report any incidents or smoldering resentments that might lead to trouble).

229. See Solida, *supra* note 117, at A01.

230. Gibbs, *supra* note 110, at 75.

231. See *New Drill in New Orleans*, S.F. CHRON., Dec. 13, 1999, at A3.

232. An entirely different situation is presented when threatening language or a hit list is accompanied by other inappropriate behavior, such as access to or possession of weapons or detailed plans. While safety must be the foremost consideration when a true threat to violence exists, this Note stresses investigation into threats without a mechanical application of zero-tolerance policies.

imagery and idle threats and it is important to consult a mental health specialist before excluding a student. This potential for violence can be effectively diffused with interventions that combine multiple agencies, community-based service providers, and family support.²³³ The community approach serves the dual purpose of helping parents and educators become knowledgeable about their children's activities and providing appropriate and timely responses to potentially disruptive behavior. This approach emphasizes student responsibility, reinforcement in all aspects of the student's life, and demonstrates that adults are interested in the student's life and care about his or her future.

Conclusion

Sarah Boman may not become a great artist, and Christopher Beamon may not become the next Stephen King. Students nationwide who scrawl hit lists may intend harm or feel no remorse for their actions. The troubled kid who casually implies that he will hurt his teacher may not correct his behavior despite counseling. The young child who mimics a story she read or violence witnessed on television may act out, unable to distinguish fantasy from reality. But all should be provided an environment to learn appropriate behavior, develop their talents, and determine their place in the world. Leave the ultimate penalty, exclusion, to those with the means or the definite intention to commit harm, not to those whose words make us cringe.

More than thirty years after the Court first recognized a student's right to freedom of speech at school, *Tinker* has been downgraded to unrecognizable status. The protective language of *Tinker* stands, but subsequent First and Fourth Amendment decisions render it hollow. Although students may successfully attack abridgment of their rights on due process grounds, lower court decisions indicate a murky probability for success. For internal and external policy reasons,

233. EARLY WARNING, *supra* note 130, at 19. The U.S. Department of Education recommends the following measures for effective interventions: (1) share responsibility by establishing a partnership with the child, school, home, and community; (2) inform parents and listen to them when early warning signs are observed; (3) maintain confidentiality and parents' right to privacy; (4) develop the capacity of staff, students, and families to intervene; (5) support students in being responsible for their actions; (6) simplify staff requests for urgent assistance (sometimes referral systems are too complex and legalistic); (7) make interventions available as early as possible; (8) use sustained, multiple, coordinated interventions; (9) analyze the contexts in which violent behavior occurs; and (10) build upon and coordinate internal school resources. *See id.* at 13-16.

courts grant local educators the widest latitude in setting school policies. Unless a student faces unthinkable degradation of rights at the hands of state officials, deference means that students (and their parents) cannot rely on the courts for relief.

Children remain the primary source of capital in the nation's future, and schools are the training ground. As a society, we have a duty to prepare all of our children for productive lives, particularly the most rowdy and needy. Columbine and similar tragedies remind us that violence can germinate in unsuspected places. Undoubtedly, schools must guarantee that students are not concealing deadly secrets, and may reduce the constitutional rights of children below those of adults in the name of safety. Swift, sure, and final punishment seems fitting, but it is important to remember that exclusion only removes individual problems while leaving structural flaws intact. Likewise, zero-tolerance policies appear to provide clear answers: we will not tolerate violence in any form. However, when those policies are mechanically applied, freedoms that must be tolerated, if not encouraged, in a democratic and liberal culture are squashed.

An effective and lasting solution combines the efforts of students, parents, educators and community leaders. At the center of the community solution is communication, requiring adults to assume an interest in all aspects of the student's life. Stretching from a child's home, to the homes of friends, to the schoolyard and the community at large, the solution encompasses all. It is hoped that children will feel less need to conceal troubles and, if they do, someone else will notice problems or changes in the student's behavior. The growth of children into responsible adults requires guidance from adults concerned with the best interests of the child. Only through community resolve, not surrender through suspensions, expulsions, and prosecutions, can we prevent another tragedy on the level of Columbine from occurring.